

No. 12388

United States
Court of Appeals
For the Ninth Circuit.

ERNEST VERNER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

JAN 10 1950

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Seattle 4, Washington

Attorneys for Appellee

United States District Court Western District
of Washington Northern Division

No. 47760

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ERNEST VERNER,
Defendant.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.

All in violation of Section 1461, Title 18, U.S.C.

Count II.

That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor

Co., 4141 4th Avenue, South, Seattle, Washington,
containing a lewd, lascivious and filthy letter.

All in violation of Section 1461, Title 18, U.S.C.

A True Bill.

/s/ [Illegible.]

Foreman.

/s/ J. CLARK DEIS,

United States Attorney.

Presented to the Court by the Foreman of the
Grand Jury in open Court in the presence of the
Grand Jury, and Filed in the U. S. District Court,
Dec. 29, 1948.

MILLARD P. THOMAS,

Clerk.

/s/ LEE L. BRUFF,

Deputy.

[Endorsed]: Filed Dec. 29, 1948.

[Title of District Court and Cause.]

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington

January 3, 1949

9:30 o'clock, a.m.

The Court: The Court now has for consideration the Indictment in the case of the United States of America, Plaintiff, vs. Ernest Verner, Defendant, Cause No. 47760. Is that defendant in person now before the Court?

Defendant Verner: Yes, sir.

The Court: With his counsel, Mr. Turner?

Defendant Verner: Yes, sir.

The Court: Has the defendant Verner received from the United States Attorney a copy of this Indictment against him?

Mr. Turner: If Your Honor please, I have received a copy of the Indictment this morning.

The Court: On behalf of this defendant?

Mr. Turner: Yes, Your Honor.

The Court: Will the defendant now observe in that Indictment how his name is written, E-r-n-e-s-t V-e-r-n-e-r?

Defendant Verner: That is right, sir.

The Court: Is that your true and correct name as written in the Indictment?

Defendant Verner: Yes, sir.

The Court: Does the defendant waive the reading of the Indictment?

Mr. Turner: Yes, Your Honor.

The Court: Is he ready to plead to the Indictment?

Mr. Turner: No, Your Honor. On behalf of the defendant, I ask for ten days in which to consider motions against the Indictment. I think I will have some motions.

(Discussion remotions against Indictment.)

The Court: What is your plea to Count I of the Indictment, guilty or not guilty?

Defendant Verner: Not guilty.

The Court: What is your plea to Count II of the Indictment, guilty or not guilty?

Defendant Verner: Not guilty.

The Court: Let this plea be entered. That plea as to each count is without prejudice to his changing that plea if he should later wish to do so before judgment is imposed. It is also subject to his right, within ten days from today, to move against the Indictment.

(Case to be placed on assignment calendar for February 23, 1949.)

[Endorsed]: Filed January 6, 1949.

[Title of District Court and Cause.]

MOTION BY DEFENDANT TO
DISMISS INDICTMENT

I.

The defendant moves that Count I of the indictment be dismissed on the following grounds:

1. Said count does not state facts sufficient to constitute an offense against the United States.

2. Said count, if it be held to charge an offense, does not state the essential facts constituting such offense.

II.

The defendant moves that Count II of the indictment be dismissed on the following grounds:

1. Said count does not state facts sufficient to constitute an offense against the United States.

2. Said count, if it be held to charge an offense, does not state the essential facts constituting such offense.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

Office and Post Office Address:
Room 1020, 1411 Fourth Ave. Bldg.,
Seattle 1, Washington

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 13, 1949.

[Title of District Court and Cause.]

MOTION OF DEFENDANT
FOR BILL OF PARTICULARS

Without waiving defendant's motion to dismiss the indictment, defendant moves for a Bill of Particulars setting forth the letters referred to in Counts I and II of the indictment herein.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

Office and Post Office Address:
Room 1020, 1411 Fourth Ave. Bldg.,
Seattle 1, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 13, 1949.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now the plaintiff in the above-entitled action and in answer to the defendant's motion for a Bill of Particulars furnishes herewith a photostatic copy of the letter referred to in Counts I and II of the Indictment herein, the letter being the same in both counts of the Indictment.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1949.

[PHOTOSTAT COPY OF LETTER]

Mr. Milton Fardan

I wish to take this opportunity at this time to thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suitor, but from one trying to give you facts and dates so you can judge for yourself, so you wont becomed ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than one can remember. The following places can be checked and verified where we have stayed together over weekends and holidays. I have verification of these and under what names we registered. At Spkane, Davenport Hotel, Sillman Hotel, Olson Motor Court, At Yakima, Commercial Hotel, Canyada Lodge, Western Motel, at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a

nightly occurence for her to sneak into my room and get into bed with me.

Milton your are a perfectly good candadate to get involved in her scheme of things and this is how it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners their at the house and then she will spring the old one, why dont you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Dont let that Church gag throw you. It has been worked on all. She did not get the nickname of Hot Pants at the bank without some reason.

A word to the wise is sufficient and if yoy see fit to continue on be sure and get your share as she is fair screwing.

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Dont be a sucker.

Sincerely yours

/s/ ERNEST VERNER.

P.S.

In my estimation she is lower than a common prostitute.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA ON BEHALF
UNITED STATES

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, 1017 U.S. Court House in Seattle, at 4 o'clock, p.m., on the 11th day of July, 1949, then and there to testify in behalf of the United States:

Milton H. Fardon, c/o Ford Motor Co., 4141-4th Ave. South, Seattle, Wash.

Mrs. W. H. (Evelyn) Nelson, 643 West 51st St., Seattle.

This 6th day of July, 1949.

J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA
FOR WITNESSES

To the Clerk of the Above Entitled Court:

Please issue subpoenas directed to the following witnesses requiring them to appear to testify at the trial of the above entitled case on Tuesday, July 12, 1949:

G. William Horton, Residence address: 10545 Interlake, Seattle, Washington.

(employed at Red & Bill's Mobil Service,
6759 15th Avenue Northwest, Seattle).

Rev. Harry E. Gardner, Address: 1407 Maple Street, Sumner, Washington.

C. G. McMillan, Address: Route 2, Box 338, Poulsbo, Washington.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

[Endorsed]: Filed July 7, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Milton H. Fardon, c/o Ford Motor Co., 4141-4th
Ave. South, Seattle, Washington.

You Are Hereby Commanded that laying aside all
and singular your business and excuses, you be and
appear in the District Court of the United States
for the West Dist of Washington at the Courthouse,
in the city of Seattle, in said district, on the 11th day
of July A.D. 1949, at 4:00 o'clock p.m. of said day,
then and there to testify and give evidence on behalf
of the United States, and not to depart the Court
without leave thereof, or of the United States At-
torney.

Witness, the Honorable John C. Bowen, Judge of
said District Court of the United States, this 6th
day of July, A.D. 1949, and in the 174th year of the
Independence of the United States of America.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Deputy Clerk.

Report to Room 1017
U S Court House,
5th & Madison Street.

J. CHARLES DENNIS,
U. S. Attorney.

U. S. Marshal's Criminal Docket No. 27893.

Received July 6, 1949, United States Marshal,
Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on July 6, 1949 and on July 7, 1949 at 2nd and Spring, Seattle, I served it on the within-named Milton H. Fardon and left a true copy thereof or a subpoena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

By /s/ JAMES M. SCHWERDFIELD,
Deputy.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Mrs. W. H. (Evelyn) Nelson 643 West 51st St.,
Seattle, Wash.

You are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the West Dist of Washington at the Courthouse, in the city of Seattle, in said district, on the 11th day of July A.D. 1949, at 4:00 o'clock p.m. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or the United States Attorney.

Witness, the Honorable John C. Bowen, Judge, of said District Court of the United States, this 6th day of July, A.D. 1949, and in the 174th year of the Independence of the United States of America.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Deputy Clerk.

Report to Room 1017
U S Court House
5th & Spring, Seattle.

J. CHARLES DENNIS.

U. S. Marshal's Criminal Docket No. 27893.

Received July 6, 1949, United States Marshal,
Seattle Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on July 6, 1949 and on July 6, 1949, 8:55 p.m. at 643 W. 51st, Seattle, I served it on the within-named Evelyn Nelson and left a true copy thereof or a subpoena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

By /s/ JAMES M. SCHWERDFIELD,
Deputy.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED
INSTRUCTIONS

Comes now the United States of America, plaintiff herein, and respectfully requests this Honorable Court to give the following instructions in the above-entitled cause:

It is requested that the Court give stock instructions on the following subjects:

1. Presumption of innocence.
2. Intent.
3. Evidence.
4. Reasonable doubt.
5. Credibility.
6. Statements by Counsel.
7. Conclusion.

Instruction No. 8

This is a criminal case. The Grand Jury has returned an Indictment against the defendant in which there are two counts. Each of these counts states a separate crime and you should consider each count separately. I will later explain to you what elements the Government must prove as to each count, but you should remember that you may consider all of the evidence in arriving at your verdict as to each count. You may find from the evidence, beyond a reasonable doubt, that the defendant is

guilty of one count while not guilty of the other count, or you may find the defendant either guilty or not guilty of each count. In other words, it is not necessary that you return the same verdict as to each count unless you are so convinced from the evidence that the same verdict should be rendered as to each count.

Instruction No. 9

Count I of the Indictment charges:

“That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.”

The defendant has entered a plea of not guilty to Count I of the Indictment. This places the burden upon the Government to prove each and every material allegation in this count beyond a reasonable doubt. The material allegations which the Government must prove in this count in the Indictment are:

1. That the offense occurred on or about November 8, 1948, in Seattle, Washington.
2. That the defendant knowingly deposited, for mailing, a letter addressed to Milton Fardon.
3. That the said letter was lewd, lascivious and filthy.

If you are convinced, beyond a reasonable doubt, of the truth of each one of these allegations, then it is your duty to return a verdict of guilty. If you are not convinced, beyond a reasonable doubt, of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty.

Instruction No. 10

Count II of the Indictment charges:

“That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.”

The defendant has entered a plea of not guilty to Count II of the Indictment. This places the burden upon the Government to prove each and every material allegation in this count beyond a reasonable doubt. The material allegations which the Government must prove in this count in the Indictment are:

1. That the offense occurred on or about November 8, 1948, in Seattle, Washington.
2. That the defendant knowingly deposited, for mailing, a letter addressed to Miss Evelyn Nelson.
3. That the said letter was lewd, lascivious and filthy.

If you are convinced, beyond a reasonable doubt,

of the truth of each one of these allegations, then it is your duty to return a verdict of guilty. If you are not convinced, beyond a reasonable doubt, of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty.

Instruction No. 11

The terms "lewd," "lascivious" and "filthy" have been used in these instructions and in the Indictment. These words have no different meaning in this case than that meaning which is ordinarily given to those terms when used outside of the court room.

The definition of "lewd" as given by the dictionary is "wicked; viscious; worthless; base; lustful; lascivious; unchaste."

The definition in the dictionary given for the term "lascivious" is "wanton; lewd; lustful; tending to produce lewd emotions."

The definition given in the dictionary for the term "filthy" is "defiled with filth; disgustingly dirty; foul; obscene." The term "filthy" has also been described as "meaning what it commonly or ordinarily signifies, that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing."

You will apply these definitions of the terms "lewd," "lascivious" and "filthy" in your deliberations when determining whether or not the letters alleged to have been mailed by the defendant fall within this category.

Instruction No. 12

It is your duty as jurors and officers of this court to follow my instructions as to the law as I have given them to you. You are not permitted to disregard my instructions merely because you may not approve of the law as passed by Congress, or because you may have a different idea as to what the law ought to be. It is the Court's duty to determine the law of this case and it is your duty as jurors to determine the facts of this case in accordance with these instructions.

In arriving at your verdict you should not allow sympathy or prejudice to influence your judgment. If the defendant is guilty, no amount of sympathy will make him innocent. Likewise, if the defendant is innocent, no amount of prejudice will make him guilty.

You are not concerned with what the punishment might be in the event you should return a verdict of guilty. The degree of punishment is a matter which the Court, alone, must decide. In other words, it is the duty of you as jurors to determine the facts of this case and it is my duty as the trial judge to determine the degree of punishment in the event a verdict of guilty is returned.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Defendant respectfully requests the Court to include in its instructions to the Jury the following:

Respectfully submitted,

/s/ THEODORE S. TURNER,
Attorney for defendant.

No. 1

You are instructed that the statute referred to in the indictment provides, insofar as here material, that every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, is declared to be nonmailable matter and shall not be conveyed in the mails, and that whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, shall be fined not more than \$5,000.00 or imprisoned not more than five years, or both.

No. 2

You are instructed that the words "lewd," "lascivious," and "filthy," as used in the statute, have reference to that form of immorality which relates to sexual impurity. In order for a sealed letter addressed to a single addressee to be lewd, lascivious and filthy within the meaning of the statute, it must contain matter offensive to the sense of chastity and naturally calculated or tending to suggest to the ad-

dressee or to create in his mind libidinous thoughts or to excite or give rise to sexually impure desires in the addressee and it must also have a tendency to deprave the moral senses of the addressee by suggesting or appealing to sexual lust.

A letter which is merely coarse, vulgar, disgusting, indecent, or defamatory, or a combination of all of these would not be lewd, lascivious, or filthy within the meaning of the statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in count 1 was lewd, lascivious, and filthy as those terms are defined in these instructions, you will acquit the defendant on count 1.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in count 2 was lewd, lascivious, and filthy as these terms are defined to you in these instructions, you will acquit the defendant on count 2.

No. 3

You are instructed that if a letter is addressed to a definite person and deposited in the United States mail for delivery to that person, there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter.

No. 4

You are instructed that the purpose, object and effect of a letter is to be judged by you from its

contents as a whole, and from the circumstances of its mailing, including the identity of the addressee, if any, his background, age, experience, position, and interest, if any, in the subject-matter of the letter.

With further reference to the contents of the letter, you are instructed that you should not judge it solely by one or more isolated words or phrases which, considered by themselves, might happen to be lewd, lascivious or filthy as defined to you by these instructions. You should, on the contrary, consider the dominant or controlling effect or character of the whole letter, and judge its effect in connection with all of the circumstances as above mentioned.

No. 5

If the purpose, object or effect of letter is to give information to the addressee in which the addressee would have a legitimate interest, rather than to corrupt or deprave the morals of the addressee, then you are instructed that the purpose, object or effect is not unlawful, and its mailing would not constitute a violation of the statute.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM OF AU-
THORITIES FOR USE OF THE TRIAL
COURT

Preliminary Statement

The indictment charges in two counts that the defendant mailed an envelope "containing a lewd, lascivious and filthy letter," in violation of Title 18, U.S.C. Section 1461. The counts are identical, except for the addressees; Milton Fardon is the addressee in the first count, and Miss Evelyn Nelson in the second.

The charge of the indictment is obviously made under the first paragraph of Section 1461, Title 18 U.S.C., which reads as follows:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . ." is declared to be nonmailable, and whoever knowingly deposits such matter shall be fined or imprisoned or both.

There is no allegation in the indictment that the letter was of such a character as to corrupt the morals of the addressee or of such persons who might receive the letter. The letter which forms the basis of the charge is addressed to Milton Fardon, and in substance warns him not to become involved with Mrs. Verne Thornquist, who is alleged in the letter to be a person of unchaste character. The letter itself is couched in vulgar

language, and accuses Mrs. Thornquist of immorality. The letter is admittedly vulgar and obscene within the ordinary lay acceptation of the term; the question is whether it is "lewd, lascivious, and filthy" as those terms are used in the statute.

The defense is that this letter, although vulgar, is not of such character as would tend to corrupt or debase the morals of the persons to whom it was addressed; that its only effects would be to shock and disgust the reader and warn him against acts of immorality and would not provoke or simulate libidinous thoughts or desires; and that the statute makes unmailable only such letters as would tend to provoke or incite in the reader morally corrupt, lewd or lascivious desires and would tend to corrupt or debase his morals.

The defendant's evidence will show that prior to the time he became involved with Mrs. Thornquist, he had been happily married for many years, was a respectable, lawabiding citizen, and active church member, and held a responsible position in a bank. Mrs. Thornquist, who at the time had a husband of her own, divorced that husband and set out to take Mr. Verner away from Mrs. Verner, to whom he was happily married. Mr. Verner, after a period of time, fell a victim for one year or possibly more, formed an illicit relationship with Mrs. Thornquist, left Mrs. Verner, and instituted one or more actions of divorce against her. However, he finally came to his senses, and went back to Mrs. Verner. Thereupon Mrs. Thornquist en-

gaged in the most extreme and even fantastic forms of persecution and harassment of both Mr. and Mrs. Verner in an endeavor to induce Mr. Verner again to leave Mrs. Verner and to join her. Various means were tried by the Verners to get rid of Mrs. Thornquist and try to reestablish their married life under normal conditions, but without much success. Finally Mr. Verner wrote the letters charged on the theory that by exposing Mrs. Thornquist at the place where she was employed he would render her harmless. The letters were sealed and obviously not designed for general distribution. One was addressed to Mr. Fardon, who, as the evidence will no doubt show, had been married before, and had just started associating with Mrs. Thornquist. The other was addressed to Mrs. Evelyn Nelson (incorrectly described in the indictment as "Miss"), who is married and living with her husband, and who is Secretary to the head of the department in the Ford Motor Company, by which Mrs. Thornquist is employed. We believe the evidence will show that the letter had no tendency whatsoever to deprave or corrupt the morals of either of these persons, and therefore the letters were not banned by the statute.

I.

Purpose and Construction of the Statute

The words "obscene," "lewd," "lascivious," as used in the statute, have the meaning that has been imputed to them at common law, viz., that which

has a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd, or lascivious thoughts and desires relating to sexual impurity:

Swearingen v. U.S., 161 U.S. 446, 16 S.C. 562, 40 L.ed. 765;

Dysart v. U.S., 272 U.S. 655, 47 S.C. 234, 71 L.ed. 461;

U.S. v. Dennett, (C.C.A. 2d), 39 Fed. (2d) 564, 76 A.L.R. 1092;

Davis v. U.S., (C.C.A. 6th), 62 Fed. (2d) 473;
Note, 76 L.ed. 845, 848.

Swearingen v. U. S., *supra*, defendant was charged with mailing a newspaper containing an obscene, lewd and lascivious article. The article is set forth in a footnote to the Court's opinion, and is similar in its language and general tone to the letters charged in the case at bar. The Court reversed the conviction, saying at page 451:

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.

"Referring to this newspaper article, as found in the record, it is undeniable that its language is

exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

In *Dysart v. U. S.*, *supra*, the charge was based upon the mailing of a postcard and letter advertising a nursing home for unmarried women during pregnancy. The letter stressed the point that the home was private and designed for the protection of unfortunate women until they were able to return to their homes and friends, free from the burden of their mistake. There were eleven counts, based on the mailing of the identical letter to various unmarried women. The Supreme Court reversed defendant's conviction, saying at page 658:

"Notwithstanding the inexcusable action of petitioner in sending these advertisements to refined women, it is not possible for us to conclude that the indictment charges an offense within the meaning of the statute as construed by the opinion just cited. The motion to quash should have been sustained by the trial court."

In accordance with the rule of the *Swearingen* case, it is uniformly held that a letter which is merely coarse, vulgar, disgusting or libelous, and which does not tend to deprave the morals by inciting lascivious or lewd thoughts or desires, does not fall within the ban of the statute:

U. S. v. Wroblenski, (D.C. Wis. 1902) 118 Fed. 495 (letter written by defendant to his mother, charging her with adulterous relations, and containing indecent language);

U. S. v. O'Donnell, (C.C. N.Y., 1908) 165 Fed. 218 (letter calling a third party many unpleasant, scurrilous and disgusting names);

U. S. v. Males, (D.C. Ind. 1892) 51 Fed. 41 (Valentine mailed to a woman containing coarse, vulgar and insulting language).

Effect of Circumstances of Mailing or Publication

Construing this statute, the Courts have recognized that certain publications or writings, if published only to selected persons, would have no tendency to deprave or corrupt, but if distributed generally, might fall into the hands of persons who might be corrupted. In the former case, no offense is committed; in the latter, mailing would constitute a violation. It is, therefore, incumbent upon the Government to prove that the act charged comes within the ban of the statute. Thus, in *U. S. v. Dennett*, (C.C.A. 2d, 1930) 39 Fed. (2d) 564, in which the charge was based on the mailing of a pamphlet designed for the instruction of children in sex matters, the Court said:

“In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might

see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper.”

This case was cited with approval by the 9th Circuit Court of Appeals in *McKnight v. U. S.*, 78 Fed. (2d) 931, 933.

The distinction between printed publications and private sealed letter was clearly pointed out by the Court in *U.S. v. Wroblenski*, 118 F. 495, *supra*, where the court says at page 496:

“If it were a publication, or the matter were sent to a young person or a stranger, I am not sure that these definitions would exclude the language or suggestion of the letter. But I am of the opinion that the general test is not applicable alike to publications and sealed private letters. In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute. *Dunlap v. U.S.*, *supra*. In the case of a private letter (sealed) there is no publication (*U.S. v. Chase*, *supra*), and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to

corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.

The motion to quash the indictment must be sustained accordingly.”

In the case at bar, the letters mentioned in both counts of the indictment were sealed letters. Hence, the question is whether under the evidence the letters were of such a character as to tend to deprave and corrupt the morals of the two addressees named in the indictment. If there is no evidence that the morals of these two addressees were in danger of corruption, the charge is not sustained.

Document Is to Be Judged by its Effect as a Whole

It is well settled that a document is to be judged in accordance with its dominant effect, and not merely by isolated words or passages. Thus, a document or book when considered as a whole might be perfectly proper, yet contain several words or passages which taken by themselves would be considered indecent or obscene; in such cases, the document or book is characterized by its dominant effect, and not by the isolated words or passages:

U.S. v. One Book Entitled Ulysses, (C.C.A. 2d 1934) 72 F. (2d) 705, 708;

Parmelee v. U.S., (App. D.C. 1940) 113 F. (2d) 729;

Walker v. Popenoe, (App. D.C.) 149 F. (2d) 511, 512.

Construction of "Filthy"

There has been no reported decision construing the word "filthy" as used in Section 1461 of Title 18 U.S.C., being the Revised Code of Criminal Procedure. It is defendant's position that this word should be construed as meaning something akin to the words "obscene" and "lewd," and having a tendency to deprave or corrupt the morals. The Government will no doubt contend that the tendency to corrupt is not an essential element of the crime charged, and that this case is controlled by the case of *U.S. v. Limehouse*, (D.C. So. Car. 1931) 58 F. (2d) 395; *rev. U.S. v. Limehouse*, (1932) 285 U.S. 424, 52 S.C. 412, 76 L.ed. 843.

Since the holding of the Limehouse case has an important bearing on the construction of the statute in its present form, it must be closely analyzed.

At the time of the Limehouse Case, the statute was 18 U.S.C. 334, and the pertinent part read as follows:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, . . . is hereby declared to be nonmailable matter . . ." etc.

The indictment contained thirty counts, each charging the mailing of "a certain filthy letter." While the letter does not appear in the opinion, the Supreme Court says of it:

"contained much foul language; charged the ad-

dressees or persons associated with them with sexual immorality"; that they "were coarse, vulgar, disgusting, indecent, and unquestionably filthy within the popular meaning of that term."

The District Court gave to the word "filthy" a meaning somewhat similar to the meanings of "obscene, lewd and lascivious" as defined in *Searingen v. U.S.*, *supra*, and sustained a demurrer to the indictment. The Supreme Court reversed, saying at page 426:

"The indictment here under review contains no reference to 'obscene, lewd, or lascivious.' The charge is of depositing 'a certain filthy letter.' It is brought under the amendment to Sec. 3893 of the Revised Statutes made by Sec. 211 of the Criminal Code, Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, U.S.C. title 18, Sec. 334, which inserted the words, 'and every filthy.' Now the clause reads 'every obscene, lewd or lascivious, and every filthy, book, . . . letter.'

"The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of *noscitur a sociis*, gave to 'filthy' the meaning attributed in the *Swearingen Case* to the words 'obscene, lewd, or lascivious.' Thus, the court emptied the amendment of all meaning. We think that it is a more natural read-

ing of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy. The letters here in question plainly relate to sexual matters. We have no occasion to consider whether filthy letters of a different character fall within the prohibition of the Act.”

The plain implication of the holding in the second paragraph above quoted is that if the statute had then read “obscene, lewd, lascivious, or filthy,” the construction given by the trial court would have been correct, and that the letters would not constitute an offense unless they had a tendency to corrupt.

Thereafter Congress revised the Criminal Code and amended this portion of the statute to read “every obscene, lewd and lascivious, or filthy book . . .”, etc.—exactly in accordance with the wording which the Supreme Court has said would make the tendency to corrupt an essential part of the offense. Therefore, we do not have to surmise what will be the Supreme Court’s construction of the statute as now worded; Congress has amended the statute to conform to the wording spelled out by the Supreme Court itself.

A reference to the Reviser’s Notes makes this conclusion even stronger. At page 2562 of Title 18 U.S.C., Congressional Service, will be found the Reviser’s Notes on Sec. 1461. The Revisers called the attention of Congress to the legislative history of the statute, and cites four cases, namely:

Youngs Rubber Corporation, Inc., v. C. I. Lee & Co., Inc., 45 F. (2d) 103;

U.S. v. Nicholas, 97 F. (2d) 510;

Davis v. U.S., 62 F. (2d) 473;

U.S. v. One Package, 86 F. (2d) 737.

The Revisers quote from these cases and summarize them, stressing the point that the statute is designed to prohibit only that which contends to corrupt, and does not prohibit that which has a proper use or purpose. In particular, the Revisers quote from the Youngs Rubber case, as follows:

“Section 334 (this section) forbids also the mailing of obscene books and writings; yet it has never been thought to bar from the mails medical writings sent to or by physicians for proper purposes, though of a character which would render them highly indecent if sent broadcast to all classes of persons.”

The Revisers also summarized the holding in the Davis case that it is necessary for the Government to prove that the intent of the person mailing a circular conveying information relative to contraception that the article should be used for the condemned purpose was necessary for conviction, and in the absence of such intent, conviction is not warranted.

There is absolutely nothing in the Revisor's Notes to suggest that matter which is simply vul-

gar or filthy, but not having a tendency to corrupt morals is prohibited by the statute.

Respectfully submitted,

/s/ THEODORE S. TURNER,
Attorney for Defendant.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, Find the defendant, Ernest Verner, is guilty as charged in Count I of the Indictment; and further find the defendant, Ernest Verner, is guilty as charged in Count II of the Indictment.

/s/ JAMES W. FRAZIER,
Foreman.

[Endorsed]: Filed July 13, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL
CASE

To C. G. McMillan, Route 2, Box 338, Poulsbo,
Washington:

You Are Hereby Commanded to appear before
the Hon. John C. Bowen, Court Room No. 1, in
the District Court of the United States for the
Western District of Washington, Northern Divi-
sion at the United States Court House, 5th Ave.,
and Spring Street, in the city of Seattle, in said
District, on the 12th day of July, A.D. 1949, at
10:00 o'clock a.m. of said day, then and there to
testify on behalf of the Defendant Ernest Verner
in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge
of the District Court of the United States for the
Western District of Washington, and the seal there-
of, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,
Attorney for Defendant.

[Seal] MILLARD P. THOMAS,
Clerk.

By JACK W. KOERNER,
Deputy Clerk.

U. S. Marshal's Criminal Docket No. 27893.

Received July 7, 1949, United States Marshal,
Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on July 11, 1949, and on July 11, 1949 at Seattle, Washington, I served it on the within-named C. G. McMillan and left a true copy thereof or a subpoena ticket with the person named above.

Marshal's Fees: Service \$.50: \$.50.

J. S. DENISE,
U. S. Marshal.

By /s/ MARION C. SINCLAIR,
Deputy.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL
CASE

To G. William Horton, 10545 Interlake, Seattle, Washington (employed at Red & Bill's Mobil Service), 6759 15th Avenue Northwest, Seattle, Wash.:

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division, at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 12th day of July, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify

on behalf of the Defendant, Ernest Verner, in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, and the seal thereof, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,

Attorney for Defendant.

U. S. Marshal's Criminal Docket No. 27893.

[Seal]

MILLARD P. THOMAS,

Clerk.

By JACK W. KOERNER,

Deputy Clerk.

Received July 7, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on July 7, 1949, and on July 7, 1949, 4:30 P.M., at 6759 15th N.W., Seattle, I served it on the within-named G. William Horton, and left a true copy thereof or a subpena ticket with the person named above.

Marshal's Fee: Travel, \$6.42; Service, \$.50; \$6.92.

J. S. DENISE,

U. S. Marshal.

By /s/ JAMES M. SCHWERDFELD,

Deputy.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL
CASE

To Reverend Harry E. Gardner, 1407 Maple Street, Sumner, Washington.

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division, at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 12th day of July, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Defendant, Ernest Verner, in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, and the seal thereof, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,
Attorney for Defendant.

U. S. Marshal's Criminal Docket No. 27893.

[Seal] MILLARD P. THOMAS,
Clerk.

By JACK W. KOERNER,
Deputy Clerk.

Received July 7, 1949, United States Marshal,
Seattle, Wash.

RETURN ON SERVICE

Received this writ at Tacoma, Washington, on July 8, 1949, and on July 8, 1949, at Sumner, Washington, I served it on the within-named Rev. Harry E. Gardner, and tendered to him and he accepted witness fees in the sum of \$4.00 and mileage in the sum of \$4.34, and left a true copy thereof or a subpoena ticket with the person named above.

Marshal's Fees: Travel, \$1.44; Service, \$.50; \$1.94.

J. S. DENISE,
U. S. Marshal.

By /s/ [Illegible.]
Deputy.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
(RENEWED) AND ALTERNATIVE MO-
TION FOR NEW TRIAL

Comes now the defendant and renews his motion for judgment of acquittal made at the close of the evidence for the Government and again at the close of all the evidence, on the ground that the evidence is insufficient to sustain a conviction of either of the offenses charged in Counts I and II of the indictment herein.

In the alternative, defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in sustaining objections to questions addressed to the witness Milton Fardan relative to the effect upon him of receiving the letter charged in Count I.

5. The Court erred in refusing defendant's offer of proof concerning the effect upon the said Milton Fardan of receiving the letter charged in Count I of the indictment.

6. The Court erred in sustaining objections to questions addressed to the witness Evelyn Nelson relative to the effect upon her of receiving the letter charged in Count II of the indictment.

7. The Court erred in refusing defendant's offer of proof relative to the effect upon Evelyn Nelson of receiving the letter charged in Count II of the indictment.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 18, 1949.

United States District Court, Western District of
Washington, Northern Division

No. 47760

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On this 22nd day of July, 1949, the attorney for the Government, and the defendant, Ernest Verner, appearing in person, the defendant being represented by Theodore S. Turner, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I and II thereof; that the Probation Officer of this District has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant, Ernest Verner, has been convicted by jury verdict and is guilty of the offense of violation of Section 1461, Title 18, U.S.C., as charged in Counts I and II of Indictment, and the Court having asked the defendant whether he has anything to say why judg-

ment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged and Ordered that the defendant, Ernest Verner, be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Twelve Months on Count I of the Indictment, and for the period of Twelve Months on Count II of the Indictment, the execution of the sentence on Count II to be concurrent with, and not consecutive to, the execution of the sentence on Count I.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 22nd day of July, 1949.

/s/ JOHN C. BOWEN,

U. S. District Judge.

Presented by:

/s/ VAUGHN E. EVANS,

Asst. U. S. Attorney.

Violation: Sec. 1461, Title 18, U.S.C. (Depositing Obscene Mail Matter in U. S. Mails.)

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

APPEAL BOND

Whereas, there is now on deposit in the Registry of the Court the sum of Two Hundred Dollars (\$200.00) cash bail to secure the appearance of the defendant above named at the trial of this cause, and it is his desire and that of Margaret Verner who deposited the same in his behalf that it be applied on account of the appeal bond of One Thousand Dollars (\$1000.00) fixed by the Court, and whereas, there is herewith tendered to the Clerk of said Court the further sum of Eight Hundred Dollars (\$800.00) in cash, being the balance of the said sum of One Thousand Dollars (\$1000.00), making the total sum of One Thousand Dollars (\$1000.00) cash bond on appeal, and it being the intention of the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, sentence and commitment entered in the above-entitled cause July 22, 1949, the condition of this bond being as follows:

Whereas, the said Ernest Verner shall diligently prosecute his appeal to the Circuit Court of Appeals for the Ninth Circuit, that he shall be firmly bound by the conditions of this bond, and if the said cause on appeal be affirmed then he shall surrender himself in execution of said judgment and sentence and if the said cause be reversed by the said Circuit Court of Appeals that he shall personally appear in accordance with the said rever-

sal for retrial, from day to day when ordered by the Court, and shall at all times comply with any and all orders of the Court, and for these purposes this bond shall be in full force and effect; and if all conditions are complied with by the said Ernest Verner, the principal, until the final disposition of the said case, then this bond shall be held for naught; but if the defendant fails to appear as ordered, payment of the amount of the bond shall be due forthwith.

If the bond is forfeited, and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the Western District of Washington against the principal on said bond and the surety for the sum of One Thousand Dollars (\$1,000.00), and the cash herein deposited shall apply on said judgment.

Dated at Seattle, Washington, this 22nd day of July, 1949.

/s/ ERNEST VERNER,
Principal.

/s/ MARGARET VERNER,
Surety.

Receipt of Eight Hundred Dollars (\$800.00) additional cash bail acknowledged.

/s/ MILLARD P. THOMAS,
Clerk of United States District Court, Western District of Washington.

Approved as to form:

/s/ VAUGHN E. EVANS,
U. S. Attorney.

Approved:

/s/ JOHN C. BOWEN,
U. S. District Judge.

Approved and Presented:

By /s/ THEODORE S. TURNER,
/s/ W. HAROLD HUTCHINSON,
Counsel for Defendant.

[Endorsed]: Filed July 22, 1949.

[Letterhead]

Drs. Ahlquist and Kepl
Paulsen Medical and Dental Building
Spokane 8, Washington

December 20, 1948.

Mr. Theodore S. Turner,
1411 Fourth Avenue Bldg.,
Seattle 1, Washington

Dear Sir:

Mr. Verner was treated by me in April, 1947, at which time he was suffering from a very severe depression. He was not psychotic; was in good contact with reality, but was having severe emotional disturbances.

During a marked depression he took an over-

dose of sleeping tablets which necessitated prompt treatment. He made a good recovery. I did not contact him again after this episode.

Yours very truly,

/s/ M. F. KEPL, M.D.

MFK:s

[Letterhead]

Trinity Methodist Church
West 65th Street and 23rd Avenue N.W.
Seattle 7, Washington

1407 Maple Street,
Sumner, Washington,
December 23, 1948.

To Whom It May Concern:

As the above letterhead indicates, I was pastor of the Trinity Methodist Church, beginning in June, 1942, and continuing until June, 1946.

When I went to Trinity Church I found Mr. Ernest Verner the Treasurer of the Sunday School, that had about \$500.00 to \$700.00 on hands and in his care.

Mr. Verner was quiet, efficient, dependable and faithful. Our relationship was very pleasant and his services very helpful and appreciated.

This relationship continued for three years tho the last year was broken in attendance and the monies were placed in the church vault for periods

of time and then turned over to him. His handling was always careful and accurate.

I tried to be of help to Mr. and Mrs. Verner after the "certain woman" came into the scene. I found Mr. Verner under tremendous strain and stress.

When out of actual touch with him I wrote him that I was sure that his character and training would never allow him to have peace of mind or true happiness until he came back to his wife and lived true to his marriage vows.

I think some things said by me and also written helped to keep him from being completely carried away by the woman who seemed to be doing all in her power to pull him away from his home and wife. But I am also quite sure it tended to bring on the sharper conflict in his mind and soul in the matter of passion desires and duty and loyalty.

As I wrote him when he was away, so again now I declare to all men, I believed in and still believe in the honesty, and the fundamental good character of Ernest Verner.

Weak he was and tempted. But I believe he tried hard to live what he believed. And tho he failed for a time the outcome but confirms my belief.

Very sincerely,

/s/ HARRY E. GARDNER.

[Letterhead]

Paul F. Phares, D.O.

Porter Building

Woodland, California

December 21, 1945.

To Whom It May Concern

Re: Mr. Ernest Verner:

Due to insinuating circumstances Mr. Verner is not improving as rapidly as he should, and I feel it is advisable that he have at least an additional three months' rest.

Very truly yours,

/s/ PAUL F. PHARES, D.O.

PFP.ck

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Ernest Verner,
1007 West 67th Street, Seattle, Washington.

Name and address of appellant's attorney: Theodore S. Turner, 1411 Fourth Ave. Bldg., Seattle 1, Washington.

Offense: Mailing lewd, lascivious and filthy letter in violation of Section 1461, Title 18, U.S.C. (two counts).

Concise statement of judgment and sentence: Judgment and sentence entered July 22, 1949, adjudging that defendant has been convicted by jury verdict and is guilty of violation of Section 1461, Title 18, U.S.C., as charged in the indictment, Counts I and II, and sentencing defendant to imprisonment in the Federal Prison Camp at McNeil Island, Washington, for twelve months on Count I and twelve months on Count II, to run concurrently.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated July 28, 1949.

ERNEST VERNER,

Appellant.

By THEODORE S. TURNER,

Appellant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME FOR
FILING RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties above named, acting through the undersigned, their respective attorneys, that the time for filing the record on appeal in the above cause with the Circuit Court of Appeals for the Ninth Circuit may be extended to October 26, 1949.

Dated at Seattle, Washington, this 17th day of August, 1949.

J. CHARLES DENNIS,
U. S. Attorney,

By /s/ VAUGHN E. EVANS,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING
RECORD ON APPEAL

Comes now the defendant and moves the Court for an order extending the time to file with the Circuit Court of Appeals for the Ninth Circuit the record on appeal in the above-entitled cause to October 26, 1949, which date is the ninetieth day from the date of filing the notice of appeal in said cause.

This motion is based upon all the files, records and proceedings herein and upon the accompanying affidavit of Theodore S. Turner.

/s/ THEODORE S. TURNER,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF THEODORE S. TURNER IN
SUPPORT OF MOTION TO EXTEND
TIME FOR FILING RECORD ON AP-
PEAL

State of Washington,
County of Kings—ss.

Theodore S. Turner, being first duly sworn, on oath deposes and says:

Affiant is the attorney for the Defendant in the above cause. Notice of appeal was filed July 28, 1949. Promptly thereafter affiant attempted to reach the court reporter who reported the testimony at the trial of this cause, but she was then on vacation and affiant did not hear from her until August 9, on which date she informed affiant that it would be impossible for her to prepare a transcript of the testimony and proceedings at the trial within the forty days after July 28, and that the earliest date on which she could hope to prepare such a transcript would be September 19, 1949. She also informed affiant that she had transcripts to prepare in connection with appeals in other causes.

Affiant believes that approximately three weeks will be necessary after receipt of the transcript of testimony in order to prepare and transmit to the Circuit Court of Appeals the record on appeal. Since affiant has no guarantee that the transcript of testimony will actually be received on Septem-

ber 19, affiant believes that it is reasonably necessary that the time be extended to October 26, 1949.

/s/ THEODORE S. TURNER.

Subscribed and sworn to before me this 17th day of August, 1949.

[Seal] /s/ W. HAROLD HUTCHINSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

On motion of Defendant, and the stipulation of the parties, and the Court having considered the affidavit of Theodore S. Turner in support of the Motion, It Is Hereby

Ordered That the time for filing the record on appeal in this cause in the Circuit Court of Appeals for the Ninth Circuit be, and it hereby is, extended to October 26, 1949.

Done In Open Court this 17th day of August, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ THEODORE S. TURNER,
Attorney for Defendant.

O. K. as to form:

J. CHARLES DENNIS,
U. S. Attorney.

By /s/ VAUGHN E. EVANS,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

PETITION TO REDUCE SENTENCE

Comes Now the defendant and respectfully petitions the above honorable court for a reduction of the sentence imposed herein.

This motion is based upon the records in this court and the affidavit filed herewith, and it respectfully requested that oral testimony be permitted with respect to this petition.

/s/ ERNEST VERNER,
Defendant.

/s/ ALLAN POMEROY,
Attorney for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed September 16, 19949.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Margaret Verner, being first duly sworn on oath, deposes and says: That she is the wife of the defendant herein, having married him August 20, 1926, and ever since have been husband and wife. That in the early days of her marriage to the defendant she worked as general clerk at the Metropolitan

Branch of the Seattle First National Bank, but that she has not been employed since 1932 except for a short period in the summer of 1945 when she attempted to relieve persons on vacation at the same bank.

That since her husband has been arrested and she and her husband have been without funds, she has been trying to work 15 hours a week on a relief job. That she and her husband are entirely without funds because of the terrific expense to which they have been subjected during the past year; that her husband has been earning approximately the sum of \$350 per month as an accountant working for himself; that they own their own home; that they have no automobile or other personal property of any kind or description. That the bail of \$1,000 which was placed with the Court in this case was borrowed from the bank and that a note has been signed with the bank to evidence the loan of this money.

That this affiant has suffered intensely as a result of this entire episode beginning with the time that Mrs. Vern Thornquist began consorting with the husband of this affiant; that as a result of shock suffered through this entire affair she lost a premature baby; that she has been to doctors and has been consulting Dr. Bowers recently, and has been advised by him that she needs an operation for what the doctor believes to be a growth; that a number of years ago she suffered a serious accident and since said time she has been unable to control her

weight and her general condition is such that the doctor believes she should not work at all.

That ever since the affair started between the defendant herein and Mrs. Thornquist, this affiant's life has been a nightmare; that when the defendant and this affiant attempted to withdraw from any association with Mrs. Thornquist, many threats were made by Mrs. Thornquist to the effect that she would get even with Mr. and Mrs. Verner. Mrs. Thornquist threatened to see that Mr. Verner would lose every job he ever got; she came to the home of this affiant several times and once with Mrs. Thornquist's mother, and demanded that the Verners get a divorce so that Mrs. Thornquist could marry Mr. Verner. When Mrs. Verner asked Mrs. Thornquist's mother what she thought of a daughter like that, the mother answered to the effect that "the laws of love are greater than the laws of God and man". Mrs. Thornquist has called the police claiming that Mr. Verner had stolen her purse and once claimed that he had stolen packages from her out of an automobile, and when confronted by the police with the truth, admitted that all she wanted was to be near Mr. Verner. On one occasion Mrs. Thornquist came to the home of this affiant and told her she was to leave her husband immediately and if she didn't leave him immediately, that she would send him to the penitentiary and spread the names of Mr. and Mrs. Verner all over the front pages of the newspapers. In January, 1937, Mrs. Thornquist accosted this affiant on the sidewalk near

the Bon Marche and struck her down, the result of which was the placing of Mrs. Thornquist under a peace bond by action of a Justice of the Peace.

That as a result of the events outlined herein and many others too numerous to mention, this affiant and her husband have been hunted in Seattle, Spokane and San Francisco.

That while this affiant is not familiar with courts, nor the legal implications of the trial or cases, she has the belief and feeling that the case of her husband was being pushed rapidly through the trial because of the statement there were other cases waiting and this case must be hurried. This affiant also feels that if given more time, more evidence could have been given by her husband and herself in respect to his case. That at the time of sentencing many of the things contained herein were not brought to the Court's attention. That this affiant has followed the sentences for other offenses and that persons have been sentenced to 3 months on marihuana and 6 months on perjury and other light sentences as compared with the severe penalty which she feels has been placed against her husband.

That this affiant desires the court to know that through all these hardships she has resolutely kept her marriage and in spite of the hardships encountered desires to keep her home and husband, and because of her condition, the severe penalty of the sentence herein imposed will work extreme hardship on her economic and financial condition,

and respectfully requests the court to reduce the sentence herein imposed.

/s/ MARGARET VERNER.

Subscribed And Sworn To before me this 15th day of September, 1949.

[Seal] /s/ MARIAN M. PARKS,

Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1949.

[Title of District Court and Cause.]

COURT'S DECISION ON DEFENDANT'S
PETITION FOR REDUCTION OF SENTENCE

Announced September 16, 1949

The Court: We have had many lengthy hearings in this case. We had a very lengthy hearing at the time of imposition of judgment and sentence.

By counsel for defendant this matter was fully presented and by the Court was fully considered at the time of imposition of judgment and sentence. That is true with respect to the effect of the sentence upon Mrs. Verner.

The defendant is lucky that he did not receive a penitentiary sentence, which likely would have been imposed upon him had it not been for the Court's

consideration of the effect upon his wife of such imprisonment.

The Court will not change the sentence unless required by an appellate court to do so.

All pending motions and petitions are denied.

[Endorsed]: Filed September 16, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To The Clerk Of The Above-Named Court:

In making up the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include all original papers filed therein, together with this designation of record.

Filed this 5th day of October, 1949.

/s/ ALLAN POMEROY and

/s/ ERNEST R. CLUCK,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1949.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMISSION
OF ORIGINAL EXHIBITS

Upon Application of the defendant, and with the consent of the United States Attorney,

It Is Ordered that the Clerk of this Court is authorized and directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, all original papers and exhibits filed in this cause.

Done In Open Court this 11th day of October, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ERNEST R. CLUCK,
ALLAN POMEROY and
ERNEST R. CLUCK,
Attorneys for Defendant.

OK as to form:

J. CHARLES DENNIS,
U. S. Attorney.

By /s/ J. CHARLES DENNIS,
U. S. Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed October 11, 1949.

In the District Court of the United States for the
Western District of Washington Northern Division

No. 47760

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington

July 12, 1949, 10:00 o'Clock, A.M.

Appearances:

Vaughn E. Evans, Assistant United States Attorney, appearing for and on behalf of plaintiff.

Theodore S. Turner, appearing for and on behalf of defendant.

Whereupon, a jury having been duly impaneled and opening statement having been made on behalf of plaintiff, the following proceedings were had and done, to-wit:

* * *

The Court: Plaintiff may call its first witness.

Mr. Evans: Mr. Mein. [2*]

BERNARD MEIN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please, and spell your last name for the reporter?

A. Bernard M-e-i-n.

Q. Where are you employed?

A. At Seattle as a post office inspector.

Q. How long have you been employed as a post office inspector? A. Twenty-two years.

Q. I will ask you whether or not you have been Inspector in Charge of the investigation of this case?

A. I was in charge of the investigation of this case, yes sir.

Q. I will ask you whether or not at any time during the course of your investigation you ever talked with the defendant, Mr. Verner?

A. I did. [3]

Q. I will ask you whether or not you took a signed statement from him? A. I did.

Q. Do you have that signed statement with you?

A. I have the statement, yes sir.

(Statement marked Plaintiff's Exhibit 1 for Identification.)

(Testimony of Bernard Mein.)

Q. Handing you what has been marked as Plaintiff's Exhibit 1 for Identification, will you state whether or not you can identify it? A. I can.

Q. Will you state what it is without revealing its contents?

A. It is a voluntary statement made by Mr. Verner and signed by him in my presence and in the presence of Inspector Wasson.

Q. I will ask you whether or not your signature appears thereon as a witness? A. It does.

Q. I will ask you whether or not Mr. Wasson's signature appears thereon as a witness?

A. It does.

Mr. Evans: I offer Plaintiff's Exhibit 1.

Mr. Turner: If the Court please, the defendant objects that this evidence is not admissible at this time. I take it that the Exhibit is intended as a confession, and I understand the rule to be that evidence of the fact some crime has been committed must first be produced before a confession is admitted.

The Court: What is the theory?

Mr. Evans: If the government does not produce a corpus delicti before the government closes its case, of course, the case will not go to the jury.

The Court: The objection is sustained subject to further proof.

Q. I will ask you whether or not at the time you were talking to Mr. Verner, at the time this

(Testimony of Bernard Mein.)

statement was signed, if you had with you any other documents which you exhibited to Mr. Verner.

A. I had the letters involved in the case.

Q. Do you have those with you now?

A. I have them with me now, yes sir.

(Envelope marked Plaintiff's Exhibit 2 for Identification.)

(Letter marked Plaintiff's Exhibit 3 for Identification.)

(Envelope marked Plaintiff's Exhibit 4 for Identification.) [5]

(Letter marked Plaintiff's Exhibit 5 for Identification.)

Q. You have been handed what has been marked for identification as Plaintiff's Exhibits 2 and 3. I will ask you whether or not you can identify them?

A. I can.

Q. Without revealing their contents, will you state what they are?

A. Number 2 is a letter addressed to Milton Fardon.

Q. A letter or an envelope?

A. Well, an envelope. The letter was in the envelope. We call them letters, but it is an envelope addressed to Mr. Milton Fardon.

Q. What is Number 3?

A. Number 3 is the letter enclosed in the envelope, Number 2, addressed to Mr. Milton Fardon.

(Testimony of Bernard Mein.)

Q. I will ask you from whom if anyone you first received Exhibits 2 and 3?

A. Exhibit 2 was submitted to me by Mr. Fardon on November 30 last.

Q. I will ask you whether or not you made any notations on Exhibit 2 to that effect?

A. I did make a notation, the date I received it and my initials. [6]

Q. Are there any other markings on Exhibit 2 which were put there either by you or someone else after you received it?

A. After I received it, Mr. Fardon also initialed it as the envelope which he had received.

Q. As to Exhibit 3, I will ask you whether or not there are any identifying marks on that which you have placed there?

A. That also has the identifying mark on it, the date and the initials both of myself and the initials of Mr. Fardon.

Q. Your initials appear on there in one or two places?

A. On two places, the date, the time he handed it to me.

Q. Whom do you mean by he?

A. Mr. Fardon.

Q. What is the other?

A. The other was the date Mr. Fardon initialed it as well as myself.

Q. Will you look at what has been marked for

(Testimony of Bernard Mein.)

identification as Plaintiff's Exhibit 4 and 5 and state whether or not you can identify them?

A. I can.

Q. Without revealing their contents, would you state what they are? [7]

A. Number 4 is an envelope addressed to Evelyn Nelson.

Q. I will ask you whether or not there are any identifying marks on that which you can identify?

A. There is an identification mark on that, the date and the initials of Mrs. Nelson and my initials.

Q. As to number 5, I will ask you whether or not there are any identification marks on that?

A. That also contains the date, the initials of Mrs. Nelson and my initials.

Q. I will ask you whether or not the envelope which is marked for Identification as Exhibit 2 bears any stamps or any postmarks?

A. Number 2 bears the postmark of Seattle, Washington.

Q. Don't read it; just say whether or not it does. A. Yes, it does bear a postmark.

Q. Are there any stamps on it?

A. There is a canceled postage stamp.

Q. As to what has been marked for Identification as Exhibit 4, I will ask you the same question?

A. That also bears a postmark and a postage stamp canceled.

Q. I will ask you whether or not at the time you took the signed statement which has been

(Testimony of Bernard Mein.)

marked for Identification as Plaintiff's Exhibit 1 you also had with you and in your possession Exhibits 2, 3, 4 and 5? [8] A. I did.

Mr. Turner: I object to that as immaterial for the same reason. Counsel is endeavoring to prove by hearsay testimony that a crime has been committed instead of calling the witnesses who know of their own knowledge. It does not yet appear how Mr. Mein can identify Exhibits 3 and 5, but I expect to cross-examine him before that letter is offered, at the time it is offered. I think at that time he will frankly admit that there is nothing on Exhibits 3 and 5 to show on their face that they ever came through the mail, and the only means by which he claims that is the fact is on the basis of hearsay testimony.

The government has subpoenaed Mr. Fardon and Mrs. Nelson. They are present. They are witnesses who know of their own knowledge and there is no reason why they should not be called, and the case go on in an orderly way. Counsel is trying to put in a confession before proving that a crime has been committed.

The Court: The objection is overruled.

Q. Will you answer the question please?

A. I did.

Q. I will ask you whether or not at the time you took the signed statement which has been marked for Identification as Exhibit 1, you exhibited to the

(Testimony of Bernard Mein.)

defendant what has been [9] marked for Identification as Exhibits 2, 3, 4 and 5? A. I did.

Mr. Turner: Just a moment, please. I object. The purpose of that question is obviously to get around Your Honor's ruling of a moment ago that the objection to the offer of confession would be sustained subject to further proof. This question can only call for an answer as to whether or not the defendant admitted. This is not direct evidence that a crime has been committed.

The Court: The Court wishes to hear the question again.

(Last question read by reporter.)

The Court: Overruled.

Q. Will you answer the question, please?

A. I did.

Q. I will ask you whether or not the defendant made any statement in respect to whether or not he had ever seen Exhibits 2, 3, 4 and 5 before?

Mr. Turner: Just a moment, please. There is the same question that your Honor has already ruled upon that it is calling for the confession and there is no evidence that a crime has been committed.

The Court: The objection is overruled.

Q. Do you recall what the question was? [10]

A. Yes. The defendant said he had seen them and mailed them.

Mr. Turner: I didn't understand the answer.

The Witness: The defendant said he had written them and mailed them.

(Testimony of Bernard Mein.)

Mr. Turner: If your Honor please, I move to strike the answer as not responsive and also that it is inadmissible because no substantive evidence of the crime has been offered, and that it is in conflict with Your Honor's previous rulings.

The Court: The objection not responsive is sustained. All of the witness's statement after the word "Yes" is stricken and the jury will disregard it.

Q. I will ask you whether or not you interrogated the defendant on the question of whether Exhibit 2, 3, 4 and 5 had ever been placed in the mail by him?

Mr. Turner: I object to that as immaterial at this time, not proper order of proof.

The Court: The objection is overruled.

The Witness: I did.

Q. And what if anything did the defendant say in response to such interrogation?

Mr. Turner: Same objection, if Your Honor please.

The Court: Overruled.

The Witness: He said he did. [11]

Q. He said he did what?

A. Mailed them, prepared them and mailed them.

Q. I will ask you whether or not you reduced to writing the statements which the defendant said in regard to having mailed these letters?

A. I did.

Q. I will ask you whether or not that statement

(Testimony of Bernard Mein.)

is the statement contained in Exhibit 1, which is marked for Identification as such?

A. It is.

Mr. Evans: I again offer Exhibit 1.

Mr. Turner: Same objection if Your Honor please.

The Court: The objection is sustained subject to further proof.

Mr. Evans: I would like to reserve the right to recall this witness. I have no further questions at this time of this witness.

The Court: You may do that. You may cross-examine.

Mr. Turner: May I reserve cross-examination?

The Court: You may do so. Remain in attendance until you are later excused by the Court.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mr. Fardon. [12]

MILTON FARDON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name and spell your last name for the reporter please?

A. Milton H. F-a-r-d-o-n.

Q. Where do you live?

(Testimony of Milton Fardon.)

A. 1729 - 12th Avenue, Seattle.

Q. I will ask you where you work?

A. Washington Mutual Bank.

Q. I will ask you whether or not you have ever worked for the Ford Motor Company?

A. I did, yes.

Q. I will ask you whether or not you ever received mail at the Ford Motor Company?

A. I did.

Q. Handing you what has been marked for Identification as Plaintiff's Exhibits 2 and 3, can you find those in front of you? [13] A. Yes.

Q. Without revealing their contents, will you state whether or not you can identify Plaintiff's Exhibits 2 and 3 for identification?

A. Yes, I can.

Q. I will ask you what they are, without revealing the contents?

A. Number 2 is an envelope and number 3 is a letter.

Q. I will ask you whether or not you ever received those in the mail? A. Yes, I did.

Q. Do you recall about what date?

A. Sometime around November 9th or 10th.

The Court: Of what year?

The Witness: 1948.

Q. I will ask you whether or not the envelope was sealed at the time you received it?

A. Yes, it was.

Q. I will ask you whether or not what has been

marked for Identification as Exhibit 3 was in the envelope at the time you received it?

A. It was.

Q. I will ask you whether or not there are any identifying marks on Exhibits 2 and 3 by which you can further identify the letter and the envelope? [14]

A. My initials are on them.

Q. I will ask you who if anybody you turned the letter and envelope over to? A. Mr. Mein.

Mr. Evans: I offer Plaintiff's Exhibits 2 and 3.

Mr. Turner: No objection, Your Honor.

The Court: Each of them is admitted.

(Plaintiff's Exhibits 2 and 3 received in evidence.)

PLAINTIFF'S EXHIBIT NO. 2

[Envelope postmarked]: Seattle, Wash., Nov. 8, 1948, 3:30 p.m.

Milton Fardan
c/o Ford Motor Co.
4141 4th Ave. So.
Seattle, Wn.

PLAINTIFF'S EXHIBIT NO. 3

[Letter]

Mr. Milton Fardan

I wish to take this opportunity at this time to

Plaintiff's Exhibit No. 3 (Continued)

thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suitor, but from one trying to give you facts and dates so you can judge for yourself, so you wont becomed ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than one can remember. The following places can be checked and verified where we have stayed together over week ends and holidays. I have verification of these and under what names we registered. At Spokane, Davenport Hotel, Sillman Hotel, Olson Motor Court, At Yakima, Commercial Hotel, Canyada Lodge, Western Motel at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a nightly, occurence for her to sneak into my room and get into bed with me.

Milton your are a perfectly good candadate to get involved in her scheme of things and this is how

Plaintiff's Exhibit No. 3 (Continued)

it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners there at the house and then she will spring the old one, why don't you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Don't let that Church gag throw you. It has been worked on all. She did not get the nickname of Hot Pants at the bank without some reason.

A word to the wise is sufficient and if you see fit to continue on be sure and get your share as she is fair screwing.

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Don't be a sucker.

Sincerely yours,

/s/ ERNEST VERNER.

P.S. In my estimation she is lower than a common prostitute.

(Testimony of Milton Fardon.)

Mr. Evans: No further questions.

Cross-Examination

By Mr. Turner:

Q. Will you state your age?

A. Forty-three.

Q. How long have you lived in Seattle?

(Testimony of Milton Fardon.)

A. A year and a half.

Q. Formerly where did you live?

A. New York City.

Q. What was your occupation there?

A. Policeman.

Q. How long were you a policeman?

A. Twenty years.

Q. Were you a plain clothesman? Patrolman,
or what? [15] A. Patrolman.

Mr. Evans: I object to the question. I think he has gone far enough into the backround of this witness. It is not within the scope of the direct examination.

Mr. Turner: I think it goes to the very fundamentals of the case.

The Court: Do you mean affecting the witness's credibility or what do you mean?

Mr. Turner: Under the law applied as interpreted by the cases, the identity and background of the addressee of a sealed letter are very relevant circumstances in determining whether any offense at all has been committed.

The Court: It is difficult for me to see what your purpose is. Are you going to prove this witness is not to be believed under oath or his testimony is to be discredited in some way?

Mr. Turner: No, Your Honor, just part of the circumstances relating to receipt of the letter. In other words, a sealed letter not intended for general distribution must be judged according to different standards than that of a newspaper or book that

(Testimony of Milton Fardon.)

is sold and distributed generally among the public, and the primary object of the Statute under which this charge is laid is to prevent the use of the mails for the [16] purpose of corrupting or depraving the morals of persons who might receive things deposited in the mails.

In the case of a sealed letter not intended for anyone else, it becomes very material to know what is the status of the addressee. There are many authorities on that point.

Where are the authorities which you mention?

Mr. Turner: Swearingen vs. U. S., cited on page 3 of the brief filed by the defendant. It gives the general rule to be applied in the interpretation of the Statute and then we come down to more specific cases.

The Dennett case on page 5 of the brief points out the distinction in circumstances dependent on the character of the reader or class of readers for whom a particular publication is intended.

Then we come down to the case of State vs. Wroblenski, one of the most extreme cases in the books, and the Court very clearly points out that in the case of a sealed private letter the question is not what might be the effect of the letter if distributed generally to the public at large, but rather the effect upon the addressee, and that is the purpose of this examination, Your Honor.

The Court: The objection is overruled. [17]

Q. Will you read the question please?

(Last question read by reporter.)

(Testimony of Milton Fardon.)

A. Patrolman.

Q. That was in New York City proper?

A. Yes, sir.

Q. As a matter of fact, part of the time you were in portions of New York where you saw a great deal of not only what we call ordinary life but the seamy side of life too, didn't you?

A. Yes, I did.

Q. In twenty years in New York City on the police force as a patrolman, you had a great variety of experience?

A. Yes, I did.

Q. Some of the cases you handled involved questions of morals?

A. No.

Q. Did you have occasion to see transactions or events that affected the questions of morals as a patrolman in New York City?

A. I think you should—you should be a little more specific with a question like that. I don't know how I can answer that.

Mr. Evans: I am going to object to this line of questioning. I don't think it is pertinent to the issues here. [18]

The Court: The objection is overruled. I am not entirely convinced of the theory but out of an abundance of caution, the Court will permit the inquiry. Proceed and be as brief as possible.

Q. Have you been married?

A. Yes, I have.

Q. How long were you married?

A. Thirteen years.

(Testimony of Milton Fardon.)

Q. Are you married at the present time?

A. No, I am not.

Q. You are divorced? A. Yes, I am.

Q. When were you divorced?

Mr. Evans: I object to the question.

The Court: Overruled.

A. About five years.

Q. You were married just the once?

A. Yes, once.

Q. Did you have any children? A. No.

Mr. Evans: I object to this. This certainly can't have any——

The Court: This objection is sustained as to whether or not he had any children.

Q. When you received this letter, what effect did it [19] produce upon you? State your reactions to the letter.

Mr. Evans: I am going to object to that. That is absolutely immaterial and irrelevant in this case. The only issue involved here is as to whether or not this letter was mailed by the defendant, whether or not it is lewd, lascivious and filthy, and those are the only issues involved.

Mr. Turner: It is evidentiary, bearing on the ultimate issue. I think Mr. Evans is right in stating that if he states it as the ultimate issue.

The Court: The objection is overruled.

Mr. Evans: May I address the court in the absence of the jury?

The Court: The jury will retire now until 1:30 under the Court's previous admonitions.

(Jury retires.)

The Court: I think it would be helpful for counsel for the government to prepare his argument for reception by the Court after the noon recess, after you have read the cases and after you have brought to the Court's attention any that you might wish to in response. I believe the Court would be aided substantially by the citation of any authorities which you think support your position.

Court is recessed until 1:30 this afternoon. [20]

(At 12:05 o'clock p.m., Tuesday, July 12, 1949, proceedings recessed until 1:30 o'clock p.m., Tuesday, July 12, 1949.)

Seattle, Washington

July 12, 1949, 1:30 o'clock p.m.

The Court: I will hear you now, Mr. Evans.

Mr. Evans: I have had an opportunity to review the theory of the defense which is set out in this brief. It appears to me that the theory of the defense is not at all applicable to this case. This is not a case where a communication has been sent to a doctor or to a relative or to someone who is known to the sender. Nor has the communication which has been sent here any legitimate use.

Referring to the revisor's notes, it seems that the obvious exception that they set out there are cases where the article or the communication might be capable of legitimate use and where the sender was sending it in good faith for that legitimate use. Here we have a communication that its sole and only

purpose is to advertise a woman allegedly according to the letter to be of loose morals. Certainly that has no legitimate [21] use. Certainly the sender cannot claim good faith.

Referring even to the quotations from the Swearingen case which counsel has cited for us, "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity and have the same meaning as given them at common law in prosecutions for obscene libel."

A letter such as this certainly falls within that classification. As near as I can see from counsel's examination of one of the prosecuting witnesses here, Mr. Fardon, there has been an attempt to show that because he is a law enforcement officer, had some considerable experience, because he has been married and because he is an adult, that anyone can send him any type of lewd and obscene literature and be free from prosecution. Certainly that is not the type of exception that has been set out in the statutes.

In one of the cases cited here which counsel says is his strongest case, the Wroblenski case, it was a communication which the defendant wrote to his mother. I believe he accused her of certain wrongful acts. This is not such a case. There is no showing here that Mr. Fardon ever knew or met the sender of this communication. Certainly unless the cross-examination shows—I don't believe it is even proper cross-examination, not being [22] within the

scope of direct examination—unless there is some showing of relationship either knowing them or some professional relationship whereby the recipient would be a doctor or something of that nature, where the information sent would have some legitimate purpose then the line of cross-examination that has been followed by counsel for the defense should not be admitted. It has come to my attention that one of the witnesses which the government has called was called by counsel for the defendant on the telephone, I believe yesterday, perhaps the day before, and informed that he was going to cross-examine her on the relationship between the defendant here and the woman whose name is mentioned in the communication. It seems to me the sole purpose of such a telephone call or such information being given to a prospective witness is for the purpose of making her fearful of being embarrassed on the witness stand by being asked things that we normally don't like to talk about in public.

It seems to me that the purpose of this cross-examination here this morning has been solely for the purpose of trying to embarrass the witness in one manner or another, which is certainly not the proper purpose of cross-examination. All it has shown is that he is an adult, has been married, has been a law [23] enforcement officer. Certainly that does not place him in the category of a doctor or any person who could legitimately use the information in this communication.

I don't believe any of the cases which counsel

has cited here come even close to being applicable to the issues involved in this case. It is the government's contention that the issues involved in this case are first, whether or not the letter was mailed by the defendant in this jurisdiction; and whether or not the communication was lewd, lascivious, and filthy, or any one of those three. Those are the only issues that are properly subject to this lawsuit.

The Court: Mr. Evans, your argument is very weighty and the Court is grateful to you for the same. Have you any law that you want to cite that causes you to think what you say you think?

Mr. Evans: I have only had opportunity to look at the law cited in the brief and I believe I am amply supported by the cases which counsel cites.

The Court: Take those cases and read the words in the reports of them which you say support you in that.

Mr. Evans: Referring to counsel's quotation of the Swearingen case on page 4 of his brief, the citation is 161 U.S. 446, 16 Supreme Court 562, 40 Law Edition 765, wherein the Supreme Court states: [24]

"The words 'obscene', 'lewd' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel."

I rely upon those words and upon the words in the Dennett case, which is a second circuit case, 39 F. (2) 564.

The Court: Do you have the new Title 18?

Mr. Evans: Yes, I do, Your Honor.

The Court: Will you turn to the table in that and convert this section 1461 into the old statute and see if there is anything there, any annotations in the old statute relating to this subject? What is the section in the old statute?

Mr. Evans: 334 is the old section, Your Honor, and there are voluminous citations in the old section.

The Court: I have the old section with me. Do you have 334?

Mr. Evans: I have it before me, Your Honor.

The Court: Will you turn to the annotations? There may be some cases there which support your contentions.

Mr. Evans: Yes, I see a number of cases here. I am referring to number 21 and 24. Under 21, the case of Knowles vs. U. S., 170 F. 409. Number 21 is on page [25] 100 of the bound section of the volume.

The Court: Under "Intent, Motive or Purpose"?

Mr. Evans: Under "Intent, Motive or Purpose", I believe. There are some pertinent annotations there, particularly the first one:

"In a prosecution for depositing obscene matter in the mails, the purpose of the defendant is immaterial, and that his motive was good is no defense."

Under note 41 on the following page, 101, under the title "Obscene Matters Within the Statute", there are a number of cases cited there, the title

being, "Objectionable Matter in General". The Swearingen case is cited and used virtually in the identical language which I have just quoted to the Court from the defendant's brief. The Knowles case is again cited there, stating:

"The word 'obscene' should be given in this statute as broad a significance as it had in common law."

The Court: Is that the one, U. S. vs. Martin, where that is cited? The Knowles case does not seem to have any direct bearing on whether or not this line of inquiry is permissible. I am trying to get some light from a decided case on the question now before the Court; namely, that one raised by the Government that this line of inquiry is improper on cross-examination. [26]

Court is recessed for ten minutes. You are permitted to go back to your office and see if you can find a statement that will help the Court in ruling upon the Government's objection to this line of inquiry.

Mr. Turner may go to the law library and see if he can find anything further that will indicate whether this is admissible or not.

(Recess.)

The Court: I would like for both sides to see this one case, the case of U. S. vs. Musgrave, 160 F. 700, the pertinent language in the opinion of the Court, on page 706 in the paragraph which starts in the lower third of that page. I will submit it to counsel for defendant and then counsel for plaintiff.

There is one other case I have seen which seems to report the Court's instructions to the jury. They are very brief. It is a very skeltonized statement in 28 F. Reporter, at page 524, in the case of U. S. vs. Bebout.

I will hear your comment as to whether you think that case is in point on the question here. I understand there that the matter was mailed from a man to his wife.

Mr. Turner: Yes. I was trying to see whether a copy of the letter was set out in the opinion.

The Court: That point is not raised. I think the [27] opinion deals with the subject matter of the discussion as being unquestionably lewd and lascivious within the meaning of the Statute. Is that language in point on the question here?

Mr. Evans: I believe it is, Your Honor.

The Court: Here is the language in this other case.

"Nor does the statute make a purpose or intent to deprave or demoralize the public, or injure individuals, an ingredient to constitute the offense. Nor does the truth or falsity of the publication make any part of the offense; the only inquiry being, was the publication obscene or indecent and was it placed in the mails for circulation in violation of the statute?"

Mr. Evans: I believe those are strictly the issues involved here, Your Honor.

The Court: Have you any cases, Mr. Evans,

which you would like to call to the Court's attention?

Mr. Evans: I believe the Court has just read from the *Bebout* case, which is one I had marked to call to the Court's attention.

The Court: The language I just read is from what purports to be the instructions of the trial judge to the jury.

Mr. Evans: Following the note in the annotations very closely, it is somewhat abbreviated. I have been [28] unable to find anything directly on this point, Your Honor, in my limited time. I have searched as diligently as I can and I am sorry I am unable to give the Court any more authorities.

Mr. Turner: If the Court please, I think that both of those cases, when properly understood, state the law. I think that the effect that counsel is endeavoring to give to them is not correct, and if that would be the proper construction, then I do not think they state the law as announced in the controlling cases.

Before pointing out this language that I think closes the issue here entirely, I would like to point out the difficulty that the courts have had in dealing with somewhat analogous ideas from two different points of view. There is much language in the books to the effect that the purpose or motive of the sender of a writing alleged to be obscene is immaterial. There are many instances of that. The *Knowles* case is one, and it is easiest to make the point by briefly summarizing that case.

The defendant, Knowles, was the publisher of a paper. An unmarried woman had become pregnant and had had an abortion committed and died as a result. Knowles used that incident as an occasion to set forth in his paper for general distribution an indictment against the [29] morals of society for being so hidebound about our institution of marriage, and he advocated in the columns of his paper free relations between man and woman without the benefit of marriage.

That was an attack upon the established morals of society. He attempted to defend on the theory that that was his sincere belief and his motives were of the best. The Court properly held that the fact that a man may sincerely believe that he is doing this thing for a good purpose does not prevent an actual violation of the statute, doing of an act actually prohibited by Congress. The subjective attitude is entirely immaterial.

On the other hand the courts have also dealt with the question of the object or purpose of a document from the objective viewpoint, and at least the more modern trend—you can find a few of the older cases prior to the Swearingen case announcing a different result, but the controlling current of authority ever since the Swearingen case has been that the document is to be judged from its net or dominant effect as a whole judged by its contents and its tendency to deprave or debauch the morals of such persons into whose hands the document might fall.

But the very definition of the crime, whether or

not the addressee or the recipient of one of these documents is such a person that the document itself in his hands might tend to corrupt or deprave his morals is the ultimate question in this case. It is one of the essentials of the crime and that is where this language in the Swearingen case, which I have quoted in the brief and which I submit the government has not given full effect to, becomes so important.

“Referring to this newspaper article, . . . its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.”

That is the important and controlling language. We have the Dennett case. There are many, many cases.

The Court: What were the facts in the Dennett case?

Mr. Turner: That was a case where a mother had two children, who, when they came to the inquisitive age, were naturally curious about sex. She looked through the literature and found nothing that met what she thought was the need of children such as hers. She made quite a study and wrote a pamphlet, took it to doctors, had their approval, and at first it was published by a medical journal. It was a pamphlet designed for [31] distribution to parents in order to instruct their children about

sex at the proper time. After its publication by a medical journal, the defendant took it upon herself to make her own publication and sold these pamphlets at 25c per copy. Some of the pamphlets went through the mail and the government charged her under this Statute and she was convicted below, and the Court used this language I have quoted in the brief and pointed out that the circumstances of distributing this pamphlet together with the contents of the pamphlet itself were not—we are not talking about the undisclosed motive of the writer or sender, only such motive as appears from the document itself and from the circumstance of mailing it, including the identity of the addressee.

In that *Dennett* case, as I recall it, the pamphlet had been mailed to a mother of children. It had not been mailed to the children themselves and the Court held that viewing the purpose and character of the document and the circumstance of the mailing, that was not a violation of the Statute and the conviction was reversed. I think a moment's reflection will show that that must be the law. Suppose for example that these prosecuting witnesses had not found it convenient to come in. Suppose they had lived in Snoqualmie or way [32] out on a farm and it was not convenient for them to come in and they mailed these identical letters to the United States attorney and said "What can be done about this?" Would they have been guilty of a violation of the Statute? Obviously Congress didn't mean that if the United States attorney—and the same Statute

makes the acceptance from the mail of such a document a crime—certainly Congress didn't mean that the United States attorney should be prosecuted under this Statute for receiving such documents through the mail.

Suppose Mr. Evans should desire to consult one of his superiors in Washington, D. C., and should mail this letter or a copy of it for an opinion by a United States assistant attorney general. Would he be guilty of a violation of the Statute?

Those are the things the Courts have uniformly ruled that this Statute must be given a reasonable and practical construction, and the Swearingen case controls here.

It is one of the circumstances of who is the addressee and what were the circumstances and is the document under all the circumstances calculated to corrupt the addressee's mind and morals?

The Court: Have you the Swearingen case report with you? [33]

Mr. Turner: Not the full report.

The Court: What are the facts in the case?

Mr. Turner: That was a newspaper as I recall.

The Court: That will sufficiently answer the Court's inquiry.

Mr. Turner: It was an article that attacked a certain person and used vile language about him, and some of the terms related to matters of sexual impurity, but the Court appraised the whole article as being one that was simply coarse, vulgar and disgusting.

The Court: The Court is of the opinion that under these two cases cited by the Court, the one in 28 F. and 160 F. under the detailed citation which the Court has given counsel, this objection should be sustained. That will be the order of the Court.

Mr. Turner: May I have an exception?

The Court: Allowed.

And to similar questions, if there is objection, the Court will sustain the objection.

Do you wish to make an offer of proof or anything of that sort?

Mr. Turner: I will do that now.

The Court: You may make your offer of proof.

Mr. Turner: In the first place, may I make a preliminary objection? [34]

The Court: Will you do so as briefly as you can?

Mr. Turner: Yes, Your Honor. First, that the right of cross-examination is being unduly restricted, but I am embarrassed in making an offer of proof because I have not had an opportunity to talk to the witness and to know exactly what he would testify to.

The Court: Be assured that the Court will give you a later opportunity, and if you would like to do it at the recess or end of the day's session or at any other time in the trial, the Court will give you the opportunity when you request it to frame your offer of proof, to advise yourself of the details sufficiently so that you can make a more complete and accurate record. You do not have to make your offer of proof now. The Court was giving you this opportunity, not requiring you to make it.

Mr. Turner: May I have the opportunity of talking to Mr. Fardon privately so that I may find out what he would testify to? Then I will make the offer.

The Court: You may do that.

Bring in the jury.

(Jury returns.)

The Court: All have returned to their places as before the noon recess. May the record show that to be the fact, that call of the jury is waived and that all [35] jurors are present and also all parties on trial with their counsel.

Mr. Evans: The record may so show.

The Court: Has the defendant any objection to that?

Mr. Turner: No, Your Honor.

The Court: The witness will resume the stand.

(Testimony of Milton Fardon.)

Mr. Evans: I believe the ruling of the Court on the objection to the last question should be made in the presence of the jury, Your Honor.

The Court: The objection is sustained. Ask another question.

Q. At the time you received that letter, Mr. Fardon, did you know Mrs. Thornquist?

A. Yes I did.

Q. That is the woman referred to in the letter?

A. Yes.

Q. Had you associated with her?

(Testimony of Milton Fardon.)

Mr. Evans: I am going to object to that as being immaterial to the issues in this case.

The Court: That objection is overruled.

A. Yes, I knew the girl, certainly.

Q. That is not the answer to the question. I asked you if you had associated with her?

A. Yes I had. [36]

Mr. Evans: I will object to the form of that question. The term "associated with" has many meanings. I ask counsel to be more specific as to what he means.

The Court: That objection is overruled.

Q. You had gone out with her socially, had you?

A. Yes I had.

Q. Entertained her in some fashion or other, either at meals or movies or something of the sort?

A. Yes.

Q. Would you describe very briefly the extent of your association with her at the time you had received the letter?

A. Just what do you mean by association? That is a broad statement, Mr. Turner.

Mr. Evans: I am going to object to that.

The Court: The objection is sustained. I think that is sufficient.

Mr. Turner: Your relationship with her was not a business relationship?

Mr. Evans: I am going to object to that as being immaterial.

The Witness: What do you mean by business relationship?

(Testimony of Milton Fardon.)

The Court: The objection is sustained.

Q. Upon the receipt of this letter, how long was it before you told anybody about the receipt of the letter? [37]

Mr. Evans: I am going to object to that as being immaterial, not within the scope of direct examination. It doesn't make any difference how long he had it before he told anybody about it.

The Court: What is the purpose of the inquiry?

Mr. Turner: I will reframe the question.

Q. Did you make a complaint to any representative of the post office or the district attorney about this letter? A. No I didn't.

Mr. Evans: I am going to object to that as not being material, within the issues of this case.

The Court: What is the purpose of it?

Mr. Turner: To find out how this investigation was instituted.

The Court: The objection is sustained.

Mr. Turner: If the Court please, I would like to reserve further cross-examination until after I have had the opportunity to talk to Mr. Fardon privately.

The Court: I do not see how that can be done. You will have to proceed now.

Mr. Turner: What I mean to say is that I wish to close the cross-examination now except for the offer of proof referred to.

The Court: That request is granted.

Is there any further cross-examination except

(Testimony of Milton Fardon.)

that [38] question which counsel just mentioned?

Mr. Turner: That is all.

Redirect Examination

By Mr. Evans:

Q. Prior to today, have you ever met or seen Mr. Verner before? A. No I hadn't.

Mr. Evans: No further questions.

Mr. Turner: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mrs. Nelson.

EVELYN NELSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name please?

A. Mrs. Evelyn Nelson.

Q. Where do you live? [39]

A. 643 West 51st.

Q. I will ask you whether or not you have ever worked at the Ford Motor Company at 4141 Fourth Avenue South? A. Yes sir.

Q. I will ask you whether or not you have ever received any mail there? A. Yes sir.

Q. I will hand you what has been marked for

(Testimony of Evelyn Nelson.)

Mr. Evans: Mrs. Nelson.

Identification as Plaintiff's Exhibit 4 and 5. Referring to each of those Exhibits, I will ask you whether or not you have ever seen them before?

A. Yes.

Q. Without revealing their contents, will you state whether or not you can identify each of those Exhibits?

A. Yes sir.

Q. Referring to Exhibit 4, will you state what it is without revealing its contents?

A. It is an envelope addressed to Evelyn Nelson in care of the Ford Motor Company, Seattle.

Q. I will ask you whether or not you received that in the mail?

A. Yes.

Q. Referring to Exhibit 5, I will ask you whether or not that Exhibit was in the envelope at the time you received Exhibit 4? [40]

A. Yes sir.

Q. I will ask you whether or not there were any identifying marks on Exhibit 4 by which you may further identify that Exhibit?

A. Yes. My initials are in the corner here.

Q. And in regard to Exhibit 5, are there any identifying marks by which you may further identify that Exhibit?

A. My initials also show, in my handwriting.

Q. Will you state whose signature purports to be on Exhibit 5?

A. It is signed by Ernest Verner.

Mr. Evans: I offer Exhibits 4 and 5.

Mr. Turner: No objection.

The Court: Each of them is admitted.

(Plaintiff's Exhibits 4 and 5 received in Evidence.)

PLAINTIFF'S EXHIBIT NO. 4

[Envelope postmarked]: Seattle, Wash., Nov. 8, 3:30 P. M., 1948.

Evelyn Nelson
% Ford Motor Company
4141 4th Avenue So.
Seattle, Wn.

PLAINTIFF'S EXHIBIT NO. 5

[Letter]

Mr. Milton Fardan

I wish to take this opportunity at this time to thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suit, but from one trying to give you facts and dates so you can judge for yourself, so you wont become ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than

Plaintiff Exhibit No. 5—(Continued)

one can remember. The following places can be checked and verified where we have stayed together over week ends and holidays. I have verification of these and under what names we registered. At Spokane, Davenport Hotel. Sillman Hotel. Olson Motor Court, At Yakima, Commercial Hotel, Canyada Lodge, Western Motel. at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a nightly occurrence for her to sneak into my room and get into bed with me.

Milton you are a perfectly good candidate to get involved in her scheme of things and this is how it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners there at the house and then she will spring the old one, why don't you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Don't let that Church gag throw you. It has been worked on all. She did not get the nickname of HOT PANTS at the bank without some reason.

A word to the wise is sufficient and if you see fit to continue on be sure and get your share as she is fair screwing.

Plaintiff's Exhibit No. 5—(Continued)

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Dont be a sucker.

Sincerely yours,

/s/ ERNEST VERNER.

P.S. In my estimation she is lower than a common prostitute.

(Testimony of Evelyn Nelson.)

Cross-Examination

By Mr. Turner:

Q. You have been married for some years?

A. Yes. Two years.

Q. You are living with your husband?

A. Yes sir.

Q. At the time of receiving this letter, what was your position at the Ford Motor Company?

A. I was a secretary.

Q. To whom? A. The depot manager.

Q. He is the man in charge of that department of the Ford Motor Company in this area, is he?

A. Yes sir.

Q. Was Mrs. Verne Thornquist, who was referred to in the letter, also employed in that same department?

Mr. Evans: I am going to object to that as being irrelevant, not within the scope of the direct examination, nor pertinent to the issues in this case.

(Testimony of Evelyn Nelson.)

Mr. Turner: The purpose of the question is to disclose——

Mr. Evans: I think it should be made in the absence of the jury if he is going to explain his purpose.

Mr. Turner: It is to develop, it has to do with the interest—whether or not the subject matter of the communication was a matter that could be considered to be a matter of proper interest or concern to the management of that department concerning an employee then working in that department.

In other words, it is the theory that the employer in charge of the particular department may properly take [42] cognizance of matters affecting in a substantial degree the employee of that department.

The Court: The objection is sustained.

Mr. Turner: I do not wish to transgress upon Your Honor's ruling. May I have the same right to make an offer with respect to this witness and the same opportunity to talk to her privately.

The Court: Yes.

Mr. Turner: With that exception, the cross-examination is closed.

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: This witness and the preceding witness will remain in attendance until later excused by the Court.

Mr. Evans: I would like to recall Mr. Mein at this time.

BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [43]

Direct Examination

By Mr. Evans:

Q. Referring to what has been marked for Identification as Plaintiff's Exhibit 1, do you have that before you? A. I do.

Q. What was your previous testimony about who signed that statement?

A. That was signed by Ernest Verner.

Q. I will ask you who wrote the statement?

A. After talking with Mr. Verner and getting his statement, I wrote it.

Q. I will ask you whether or not Mr. Verner read it before he signed it?

A. He did read it.

Q. I will ask you whether or not the information set out in that statement was substantially the same as what Mr. Verner told you verbally?

A. It is substantially the same, and after reading it, he said that it was.

Mr. Evans: I again offer Plaintiff's Exhibit 1.

Mr. Turner: There are certain portions of that that I desire to object to, Your Honor.

The Court: Do you wish to question the witness in the voir dire?

(Testimony of Bernard Mein.)

A. Yes I do, but he has not yet closed his direct examination as I understand it.

The Court: I am giving you the opportunity to say whether or not this statement was taken under proper circumstances.

Mr. Turner: Yes I do. Mr. Mein, at the time you talked to Mr. Verner, you had previously talked to Mrs. Verner, had you not?

The Witness: Mrs. Verner had called me on the telephone and told me that she had opened a letter which I had sent to him.

Mr. Turner: In your conversation with her, she told you something of the background of this matter, did she not?

The Witness: She asked me to get in touch with you. She said you were her attorney.

Mr. Evans: I am going to object to this line of testimony. I don't see where this has anything to do with the signed statement.

The Court: The objection is sustained. You can ask him the circumstances under which he took the signed statement.

Mr. Turner: That is right. I can't do it all in the same sentence. I am trying to develop the fact that the conversation with Mrs. Verner was so closely connected in point of time as to form a part of what was said and [45] done at the time of the taking of this statement from Mr. Verner.

The Court: It is not properly a part of the voir

(Testimony of Bernard Mein.)

dire to establish whether or not this statement was legally taken. The objection is sustained.

Mr. Turner: I have no question about legality. I think I can reserve that, but I do have an objection to certain passages of this, Your Honor, if the purpose is to put the whole document in evidence.

The Court: I understand the document is offered in evidence.

Mr. Turner: It has been so offered, and there are certain passages of it that I would like to object to. I object to the last statement, the last sentence in the third paragraph of the document, Your Honor. I believe it is objectionable as being a conclusion and is not a statement of fact.

The Court: You mean the last statement made?

Mr. Turner: No, just the last sentence in the third paragraph.

The Court: Is there any response?

Mr. Evans: Yes, Your Honor. That is a matter which is to be proven, which is set out in one of the cases which we have previously referred to, the Bebout case. That is one of the elements of the offense as [46] set out in the note here. I am trying to refrain from discussing exactly—

The Court: Yes, I have in mind the issue between the parties on this matter. This objection is overruled and Plaintiff's Exhibit 1 is now admitted.

(Plaintiff's Exhibit 1 received in evidence.)

PLAINTIFF'S EXHIBIT NO. 1

Seattle, Washington,
December 1, 1948.

Statement of Ernest Verner:

I am 43 years of age, born November 4, 1905, living at 1007 W. 67th St., Seattle, Wash., with my wife, to whom I have been married for 22 years.

On three occasions I have started divorce proceedings, with the intention of marrying Miss Verne Thornquist, whom I have known for above five years.

Recently I learned Miss Thornquist had been associating with one Milton Fardan, employed by the Ford Motor Co., 4141 4th Ave. South, Seattle, Wash. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Co., at 4141 4th Ave. So., including Mr. Fardan, Evelyn Nelson, (In pencil: Delete by cutting) in which I made reference to Miss Thornquist's actions and behavior. I knew I should not have written this type of letters.

The letters addressed to Milton Fardan and Evelyn Nelson, postmarked at Seattle, Wash., Nov. 8, 1948, bearing my signature, have been shown to me today by Post Office Inspector Bernard Mein, and they were both written and mailed by me.

This statement is entirely voluntary on my part,

Plaintiff's Exhibit No. 1—(Continued)
knowing that it may be used in court against me,
and no promises of any kind have been made to me.

/s/ ERNEST VERNER.

Witnesses:

/s/ L. D. WASSON.

/s/ BERNARD MEIN.

[Endorsed]: Filed October 26, 1949.

(Testimony of Bernard Mein.)

Mr. Evans: Since this witness typed it, I would like to have this witness read it, if I may, Your Honor, at this time.

The Court: You may do so.

Q. Will you read that exhibit to the jury, please?

A. "Seattle, Washington, December 1, 1948. Statement of Ernest Verner: I am 43 years of age, born November 4, 1905, living at 1007 W. 67th St., Seattle, Wash., with my wife, to whom I have been married for 22 years.

"On three occasions I have started divorce proceedings, with the intention of marrying Miss Verne Thornquist, whom I have known for about five years.

"Recently I learned Miss Thornquist had been associating with one Milton Fardan, employed by the Ford Motor Co., 4141 4th Ave. South, Seattle,

(Testimony of Bernard Mein.)

Wash. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Co., at 4141 4th Ave. So., including Mr. Fardan, Evelyn Nelson, Phyllis Kirkpatrick, [47] and others in which I made reference to Miss Thornquist's actions and behavior. I knew I should not have written this type of letters.

"The letters addressed to Milton Fardan and Evelyn Nelson, postmarked at Seattle, Wash., Nov. 8, 1948, bearing my signature have been shown to me today by Post Office Inspector Bernard Mein, and they were both written and mailed by me.

"This statement is entirely voluntary on my part, knowing that it may be used in court against me, and no promises of any kind have been made to me." It is signed Ernest Verner, in the presence of myself and Inspector L. D. Wasson.

Mr. Evans: No further questions.

Cross-Examination

By Mr. Turner:

Mr. Turner: If the Court please, I overlooked one objection. I desire to have leave to make it now. I noticed in the reading of that document that certain other persons who are mentioned in it as having received letters—they are not referred to in the indictment. They refer to other transactions and I move that that part be stricken and the jury instructed to disregard it.

I move to strike out in the third paragraph, line

(Testimony of Bernard Mein.)

4, the words "several of the"; then in line 5, the word, [48] "including" and in line 5 and 6 the words "Phylis Kirkpatrick and others" on the ground that they relate to other matters and might be construed by the jury to relate to other offenses.

The Court: What have you to say, Mr. Evans?

Mr. Evans: Other similar offenses, Your Honor, may be shown. These offenses are identical and intent being an ingredient of this crime, I believe the government is entitled to show if it so desires other similar offenses, other identical offenses. I don't believe it would be proper to strike those words from this statement. This is the defendant's own statement, signed by him, given freely and voluntarily.

The Court: One of the consequences of leaving it in would be that it might open up certain rebuttal testimony. The request to strike those words "Phylis Kirkpatrick and others" is granted and those words are stricken out and the jury will disregard them.

Mr. Evans: Your Honor, I am worried about the practical aspects of——

The Court: Before the Exhibit is sent to the jury room, the clerk will in the presence of counsel, paste over those words sufficient obliterating material to cover that up.

Q. Mr. Mein, how long did this interview with Mr. [49] Verner take?

A. Well, from my recollection, I would say

(Testimony of Bernard Mein.)

about twenty or thirty minutes, probably not more than half an hour.

Q. Isn't it a fact that you talked about quite a few things, didn't you?

A. I just showed him the letters and asked him whether he had written them and he said he had.

Q. You had known Mr. Verner for quite a period of years?

A. I did not recall ever having seen him before.

Q. You would ask Mr. Verner something and you would discuss it for a while and then you would write down your own summary of what you felt that Mr. Verner had said, is that correct?

A. His words, yes.

Q. You mean to say that Mr. Verner used those exact words?

A. He said that he had written the letters, and why he had written them, and I put it down just as he told it to me, and then he read it carefully and he said "Yes, that is correct" and he also said that in the presence of Inspector Wasson before he signed it.

Q. Where was this interview taken?

A. In the post office building. [50]

Q. In your office there?

A. In my office, yes.

Q. Did you advise him that he could have his attorney present if he so desired?

A. Pardon?

(Testimony of Bernard Mein.)

Q. Did you advise him that he could have his attorney present?

A. Oh yes, and I also advised him that he did not have to make any admission or statement whatsoever, that anything he said could be used against him.

Q. You did not put that in the statement, that he did not want an attorney?

A. At this time?

The Court: In Plaintiff's Exhibit 1, is that what you refer to?

Mr. Turner: Yes.

The Witness: No, it is not in the statement.

Q. Didn't he tell you quite a little about the background of this matter, what has gone on so far as Mrs. Thornquist is concerned?

A. Only that he had known her for a short time—no, he didn't go into the background. He said he had known her for several years.

Q. Is that all he said?

A. He didn't go into details. [51]

After he read the letter—I showed him the letter. He read that and he said, yes he had written it. We didn't go into his past, no.

Q. You didn't go into that at all?

A. Except that he had known her over a period of years.

Q. And that is all he said about it, that he had known her over a period of years?

A. Yes, said that he had planned to marry her

(Testimony of Bernard Mein.)

and had brought suit for divorce against his wife for that purpose.

Q. As a matter of fact, hadn't you known him, Mr. Verner, at the time he was working in the bank, and you had gone in there as a customer of the bank?

A. He mentioned that. He had recognized my name as a customer of the bank while he was employed there but I did not at that time ever recall ever having seen him at the bank. I don't know what department he was in or whether I ever contacted him.

Q. There was also mentioned between you Mr. Pinkham, who was for many years one of the postal inspectors, whom Mr. Verner had also known?

A. Mr. Verner remarked to me that he had known me and several other inspectors who had bank accounts at the bank, and he included Inspector Pinkham's name in it, and I believe one other.

Mr. Turner: That is all. [52]

Mr. Evans: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mr. Wasson.

LAMAR D. WASSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your name, please, and spell your last name for the reporter?

A. Lamar D. W-a-s-s-o-n.

Q. Where are you employed?

A. The Post Office Department.

Q. In what capacity?

A. Post office inspector.

Q. How long have you been so employed?

A. Eight years.

Q. Do you have Exhibit 1 before you?

A. I do. [53]

Q. I will ask you whether or not you were present when Mr. Verner signed Exhibit 1?

A. I was.

Q. I will ask you whether or not he signed it freely and voluntarily?

A. Yes.

Q. I will ask you whether or not your signature appears there as a witness to his signature?

A. It does.

Q. I will ask you whether or not Mr. Mein was likewise present at this time. A. He was.

Q. I will ask you whether or not at the time Mr.

(Testimony of Lamar D. Wasson.)

Verner signed that he acknowledged that the statements set forth in Exhibit 1 were true?

A. He did.

Mr. Evans: No further questions.

Mr. Turner: No question.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Evans: I have no further evidence to present, Your Honor. However, before I officially rest my case, I would like to have an opportunity to determine the obliteration on Exhibit 1 as to how it is to be [54] accomplished.

The Court: You may do that. The clerk may consult with counsel about the proper manner of covering that stricken material.

Mr. Evans: Counsel and I have discussed the matter and I believe it might be agreeable if with a razor blade those particular words could be cut out and pasted on a piece of paper and preserved as being the words which are deleted, if they could be so arranged on another sheet in the same general position so that they might be able to be referred to.

The Court: Is there any objection?

Mr. Turner: I think that is a very sensible suggestion.

The Court: Will counsel supervise the accomplishment of that result?

Mr. Evans: At the next recess, we can accomplish that.

The Court: That will be agreeable to the Court.

Mr. Evans: The government rests.

The Court: Do you wish to take up some matter in the absence of the jury?

Mr. Turner: Yes, Your Honor. There are several matters and I suggest that the jury be excused at this time. [55]

The Court: The jury will be excused temporarily.

(Jury retires.)

Mr. Turner: In the first place, if the Court please, I feel that before the government is allowed to rest, I should have the opportunity of discussing with these complaining witnesses—of finding out what they would testify to if I were allowed to ask the questions. It might be that in such a conference I could find out they would testify to some things that the Court would admit, that I should be allowed to make any offers prior to the government resting, because it is properly part of the government's case. I would feel embarrassed were I to inject that at a later stage of the trial.

I think the defendant is entitled to make his challenge, if any, to the government's case on the basis of the entire government's case.

The Court: The Court will give you that chance now if you wish to do that.

Mr. Evans: I have told these witnesses the same thing that I have always told other witnesses, that I have no power to either compel them to talk to opposing counsel or any power to compel them to re-

frain from it, in any regard. Perhaps the Court has that power, but I do not feel I do. I have always told my [56] witnesses that and I have told these witnesses, that it is a matter of whether they care to talk to opposing counsel.

The Court: The Court will be in recess ten minutes.

(Recess.)

Mr. Evans: The stricken words have been cut out of the original and pasted on a sheet of paper. May the piece of paper that has the stricken words on it be so labeled as to what it is and made a part of the record; that is, it will not go to the jury but in case there is any later argument in any manner, the clerk will be directed to label this as being the stricken words taken out in accordance with the Court's order from Exhibit 1.

The Court: Is there any objection?

Mr. Turner: No objection to that, Your Honor.

The Court: Let it be marked Plaintiff's Exhibit 1-A. It is not received in evidence, it is merely marked for the record to indicate what was taken out of Plaintiff's Exhibit 1.

Mr. Evans: That is correct.

(Document marked Plaintiff's Exhibit 1-A.)

The Court: Are you ready to make your offer of proof?

Mr. Turner: I want to state first that Mrs. Nelson spoke with me, was willing to answer my questions and I am prepared to make an offer of proof as to what she would testify to. May it be assumed

for the purpose of record that she is now on the stand?

The Court: Is there any objection to that?

Mr. Evans: No objection.

The Court: The Court has none. Let that assumption be made.

Mr. Turner: I offer to prove by the witness, Evelyn Nelson, that upon receipt of this letter she was shocked and disgusted and felt that the letter was insulting, and that the letter produced no other effect on her.

The Court: Is there any objection?

Mr. Evans: I would object to that proof being presented to the jury, Your Honor, as being irrelevant and immaterial and not part of the issues in this case.

The Court: The Court sustains that objection.

Mr. Turner: I further offer to prove by the witness, Evelyn Nelson, that at the time of receiving this letter, Mrs. Verne Thornquist, who is referred to in the letter in count 2, was an employee of the Ford [58] Motor Company in the same department with Mrs. Evelyn Nelson and was under the supervision and direction of the head of that department to whom Mrs. Nelson was the secretary.

The Court: Does that complete that offer?

Mr. Turner: Yes, Your Honor.

Mr. Evans: I make the same objection to that proof, that it is immaterial, has no bearing upon any of the issues involved in this case.

The Court: On that offer, I wish to call to the

attention of counsel on both sides that one paragraph of Exhibit 1 has the following statement: "Recently I learned Mrs. Thornquist had been associating with one Milton Fardon, employed by the Ford Motor Company. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Company, including Mr. Fardon and Evelyn Nelson."

The testimony may be further explanatory of that, and the plaintiff has seen fit to offer this exhibit in evidence by that reference to the Ford Motor Company and the employment of Mrs. Thornquist. The objection is overruled, and I hold that counsel making the offer is entitled to produce that evidence encompassed in this offer before this jury.

Mr. Turner: I assume that when the jury is recalled [59] Mrs. Nelson will be recalled to the stand and I will be allowed to ask that question.

The Court: You may.

Mr. Turner: Should I complete my other offers?

The Court: Yes.

Mr. Turner: I further offer to prove by the witness, Evelyn Nelson, that she did not make a complaint to the federal authorities, to the post office or the United States attorney spontaneously, but that she did in response to instructions from someone—just who I have been unable to find out,—call that to the attention of the authorities and answer their questions relating to it.

The Court: Is there any objection to this offer?

Mr. Evans: I object to that offer as being abso-

lutely irrelevant and immaterial, how or by what means the government officials gained knowledge of this. I can't see where it has any bearing on this case, as to whether or not this witness spontaneously went right down to the postal inspectors. It has no bearing upon the issues of this case whatever.

The Court: Do you wish to state your theory of admissibility?

Mr. Turner: I think it has some evidentiary value as bearing upon the effect of the letter upon the addressee. [60]

The Court: The objection to the offer is sustained.

Mr. Turner: May I have an exception to the ruling of the Court excluding the several offers and each of them?

The Court: The exception is allowed.

Mr. Turner: With respect to the witness, Milton Fardon, he refused to have any conversation with me other than to state that anything that passed between him and myself should be only when he was on the witness stand, and I was unable to obtain any information from him at all as to what he might testify if I asked, and I desire leave to call him to the stand in the absence of the jury in order to ask these questions in order to make the offer of the proof as to what his answers will be.

The Court: You may do that. The Court wishes the record to show that the government's case in chief is opened up for the purpose now and the other purpose of the offers which were made, and

the Court rules the government's case in chief will be opened up during these recess proceedings in the absence of the jury and will be opened up during the time when the Court may permit counsel to produce in the presence of the jury the offered proof to which the Court consents and approves counsel doing. [61]

MILTON FARDON

recalled as a witness, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

By Mr. Turner:

Q. When you received this letter, what effect did it produce on you?

Mr. Evans: I am going to object to that type of questioning for the same reason as stated before, the effect upon the recipient is not an issue in this case.

The Court: The Court sustains the objection upon the authority of those two cases which I have previously cited, the one in 28 F. and the one in 160 F.

Mr. Turner: If the Court please, it was my understanding that the Court would allow me to call Mr. Fardon to the stand for the purpose of finding out. I can't know what his answer will be unless he is allowed to answer for the purpose of enabling me to make an offer of proof. I am not asking that it go in evidence at this time.

(Testimony of Milton Fardon.)

The Court: For the purpose of advising counsel what proof will be available for his offer, the Court permits counsel to make the inquiry and will postpone [62] the ruling on the offer until the offer is made. This is, as I understand it, an investigation to see what he will have available for offering. You may answer the question.

The Witness: I don't know—I was deepy surprised, deeply puzzled, perplexed, at receiving a letter from a man whom I had never seen in my life.

Q. It had no other effect on you?

A. Yes, it did have an effect. As a matter of fact, I thought it was pretty crude of a man to write that kind of a letter about any woman, regardless of the justification, circumstances or anything else, a very poor specimen of a man.

Q. Did it have any other effect?

A. Well, we could go on and on with this. A man who could write a letter like that could be—oh, I guess, subjected to a very lengthy criticism.

Q. So far as you are concerned, you have expressed it—in other words, you thought that you were surprised and puzzled and you felt that it wasn't the sort of letter that a man should write?

A. Definitely not.

Q. And that about summarizes the effect that it had upon you? A. In a way, yes. [63]

Q. And it had no other effect or different effect?

A. I just don't quite clearly understand that question.

(Testimony of Milton Fardon.)

Q. If it produced any other effect upon you, I want to know what it was.

A. Generally speaking, no.

Q. Did you on your own volition make complaint about receipt of this letter?

A. No, I didn't, not spontaneously. If I remember correctly, Mr. Mein had called or visited the Ford plant and left a message for me to call him.

Q. And you told the government about it only in response to Mr. Mein's call? A. Yes.

Mr. Turner: That is all. Now if Your Honor please, I want to prove by the witness now on the stand that he would testify in front of the jury as he has now testified in Your Honor's presence in the absence of the jury. Your Honor will understand that I am simply trying to save time in making my offer. If the offer is not clear, I will try to repeat it in full but I think Your Honor knows the substance of my offer.

The Court: I understand it if you are satisfied with the record, Mr. Turner.

Mr. Turner: Yes, Your Honor.

Mr. Evans: The entire testimony that has been offered is objected to as being irrelevant and immaterial, not within the issues of this case, serves no useful purpose whatever.

The Court: Upon the same authority as that stated by the Court a moment ago in sustaining an objection to an offer of proof, the Court does now sustain this objection to this offer of proof.

(Testimony of Milton Fardon.)

Mr. Turner: May I have an exception to the Court's ruling?

The Court: Allowed.

Mr. Turner: I am sorry to say I am not quite clear on the ruling of the Court made when the jury was in Court on the extent of my inquiry into Mr. Fardon's previous association with Mrs. Thornquist as of the time of receiving the letter.

The Court: Do you mean with reference to business association in the Ford plant? Is that what you speak of now or something else?

Mr. Turner: I had asked the question as I remember, "your association wasn't a business association?" and an objection was sustained to that.

The Court: By that question, did you expect to prove their association was something of a personal or social nature?

Mr. Turner: Yes, Your Honor. [65]

The Court: You do not expect to establish that they were employed together at the same plant and that the business interest was in any way involved in any of these matters?

Mr. Turner: No, I was trying to get the negative. It was my understanding that was the fact.

The Court: The negative of that fact is not opened up by anything that has been brought forward in the plaintiff's case. The affirmative of that fact; namely, that there may have been some relationship in the business of the Ford Motor Com-

(Testimony of Milton Fardon.)

pany at 4141 Fourth Avenue South, Seattle, has been opened up. That issue has been opened up by this Plaintiff's Exhibit 1, but the negative of that has not been so opened up and I do not see any materiality of it.

As a matter of fact, had not the plaintiff opened up the question of business relationship between certain of these witnesses, and in connection with the sending of this alleged obscene matter through the mail, the Court would not permit the cross-examination to show any fact concerning business relationships. It is Plaintiff's Exhibit I which has caused the Court to rule differently on one of your offers of proof and overruled the objection thereto.

Mr. Turner: The language that I had in mind in [66] Plaintiff's Exhibit 1 was "recently I learned Mrs. Thornquist had been associating with one Milton Fardon." I submit that this defendant is entitled to inquire into the nature of that, it having been offered by the government.

The Court: The last time I spoke of the exhibit, I was not aware the exhibit said anything about that. Now the Court is reminded that the exhibit introduced by the plaintiff does disclose something of that nature and I hold you are entitled to cross examine the same.

Mr. Evans: The direct examination didn't touch upon that, Your Honor.

(Testimony of Milton Fardon.)

The Court: This witness is the one who would know about that.

Mr. Evans: He is entitled to call him as his own witness, but I do not think he has the right to cross-examine him on that subject.

Mr. Turner: This is part of the government's case, Your Honor.

The Court: In the interest of time consumption, I am going to let this question be asked of this witness before the jury.

Mr. Turner: Then there is no point in going into it right now. [67]

The Court: No, but anything that is touched upon in that exhibit of the nature you last described, the Court is going to permit you to inquire of this witness while he is on the stand.

Mr. Turner: Then I think that concludes my offer of proof.

Mr. Evans: For the purpose of the record, may I have an exception?

The Court: Allowed.

Bring in the Jury.

(Jury returns.)

The Court: Let the record show all jurors have returned to their places as before.

Mr. Evans: It is so agreed.

Mr. Turner: Yes, Your Honor.

The Court: The government's case in chief is opened up for the purpose of further cross-examination in this connection.

(Testimony of Milton Fardon.)

Q. Mr. Fardon, what was the extent of your association with Mrs. Thornquist up to the time you had received the letter which is Exhibit 2 and 3?

A. Oh, I had gone to dinner with her a couple of times.

Q. You had been out to dinner with her?

A. A couple of times. [68]

Q. I didn't hear you.

A. I said I had been out to dinner with her a couple of times, once at her home and I took her out to dinner once.

Q. Is that all the association you had had with her up to that time? A. Yes that is all.

Q. Over what period of time had that association continued? A. I don't know off hand.

Q. Can you give the approximate time?

A. A month or two I guess.

Q. When did you first meet her?

A. When I started to work at the Ford Motor Company.

Q. When was that?

A. About a year and a half or a year ago.

Q. That would be July of 1948?

A. Oh no, it was before that—no, it was about February of 1948. February or March. Then I knew her only passing by, I didn't know her to speak to.

Q. You first started associating with her a month or so before you got the letter, and that was sometime in November?

(Testimony of Milton Fardon.)

A. Listen, counsel, I just don't like that word, associating. It has a very broad—it doesn't sound—[69] what do you mean by association?

Q. You can tell what you mean when you answer the question.

A. No, I want to know what you mean.

Mr. Evans: I object to the form of the question unless counsel defines what he means by association.

The Court: The objection is sustained. Have in mind what the witness said or tried to describe as the nature of his acquaintance, the length of it rather than the word, association.

Q. Your relationship or acquaintance with Mrs. Thornquist, so far as it was a social acquaintance and relationship, had existed you say for a month or so prior to November, 1948?

A. Yes—no, no not prior to. I worked there at the Ford Motor Company for about ten months and Mrs. Thornquist was more or less an acquaintance like any of the other women who worked there, no more than, just say "Good morning," or "Good afternoon" or "Good night."

Q. Did you take her out to the theater?

A. No.

Q. You took her to dinner? A. Yes.

Q. You had dinner at her home once?

A. Once, yes. [70]

Q. About when was that?

A. I can't remember that, it is so long ago.

(Testimony of Milton Fardon.)

Mr. Evans. I object to that. He is going into the nature of the relationship, that it was a social relationship, not a business relationship. I believe that was the limit which was placed upon his right to cross-examine.

The Court: The objection is overruled with this proviso: that if the witness can state it now as nearly as he can, this should end the inquiry on that particular detail.

Mr. Turner: I am just trying to get a definite answer. It is a little bit vague.

The Court: If you recall, will you give the information needed to answer that question?

The Witness: No, I can't recall the exact time, Your Honor.

The Court: Ask him another question.

Mr. Turner: That is all.

Mr. Evans: No further questions.

The Court: You may step down.

Mr. Evans: I would like to ask if this witness may be permanently excused at this time.

The Court: Is there any objection?

Mr. Turner: It might be that it would be necessary [71] to recall him for a further purpose. As matters now stand, I cannot say with any assurance that he will be necessary, but I cannot foretell what will happen.

The Court: The Court directs the witness, Fardon, to remain in attendance until he is later excused by the Court.

Mr. Turner: Mrs. Nelson.

The Court: Recall Mrs. Nelson.

EVELYN NELSON

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

By Mr. Turner:

Q. Mrs. Nelson, at the time you received the letter which has been identified as Exhibits 4 and 5, Mrs. Thornquist was an employee of the Ford Motor Company in the same department in which you worked, was she? A. Yes.

Q. And she was under the supervision and direction of the head of that department?

A. Yes. [72]

Q. And you were the secretary to the head of that department, is that correct?

A. Yes. However, I might add this—

Mr. Evans: Just a moment. Don't volunteer any information, it might not be admissible.

Q. How long had Mrs. Thornquist been employed in that capacity in that department prior to the time you received the letter, Exhibits 4 and 5?

A. Since July, 1947, I believe.

Q. For more than a year? A. Yes sir.

Mr. Turner: That is all.

(Testimony of Evelyn Nelson.)

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Is there any further evidence?

Mr. Evans: The government again rests.

The Court: The plaintiff rests.

Mr. Turner: If the Court please, I have an argument to make now on the basis of the admission of these documents, with reference to these exclusions of evidence. I feel that as the case now stands, these offers of proof would be admissible. I don't want to go into the substance of the argument in the presence of the jury unless the Court directs, but I feel that [73] rule which the government has relied on in making the objections to my offers of evidence is in substance that the background has no bearing on the charge.

The Court: Unless there is something different or a different authority, I prefer to ask you to—

Mr. Turner: I want Your Honor to appreciate my point. I feel that the government has opened up that background by offering in evidence Exhibit 1, which goes into the background and circumstances—I don't want to refer to the details of it, but the point is that the government has selected certain background and circumstances surrounding the mailing of these letters and they have put that part in, but they want to exclude the balance of the surrounding circumstances that bear on the defendant's case. I think the entire circumstances

should be allowed in, and when the government offers witnesses to detail part of these circumstances, I am entitled to cross-examine to bring out the balance, and in view of the fact that at the time Your Honor made these rulings of exclusion, this document had not yet been admitted in evidence, I think the case is now in a different condition. The government has opened the matter up and in fairness, we are entitled to offer the other side, the balance of the circumstances.

The Court: The jury will temporarily retire.
(Jury retires.)

The Court: What issue does Plaintiff's Exhibit 1 offer that has been covered by the direct examination or by the exhibit as to which you have not already been accorded the right of cross examination?

Mr. Turner: I asked Mr. Mein a question on cross-examination, if before he talked to Mr. Verner he had not had a conversation with Mrs. Verner in which he received mention of this background and an objection was sustained to that.

The Court: That is not covered in this.

Mr. Turner: Yes, Your Honor, in the second paragraph and the first paragraph. It starts right out that he was married and living with his wife, had been married for 22 years and on three occasions had started divorce proceedings with the intention of marrying Mrs. Verne Thornquist whom he had known for about five years.

I wanted to ask him if Mrs. Verner hadn't told

him some of that very background on the telephone, and that was so intimately connected in point of time with the statement which he took from this defendant that he knew it at the time he took this statement, that it was a different version of this background that he had incorporated in this confession. [75]

He puts his own construction of the language in there, but it is a part only, and there were other matters that Mr. Mein knew at that time, and he was the one whose language is contained in this exhibit. I wanted a chance to cross-examine him about that. That is one of the things.

The Court: What else is there?

Mr. Turner: So far as this exhibit is concerned I can only say this generally, I think the exhibit opens up the entire background and circumstances that preceded and surrounded the mailing of the letters charged.

The Court: I would be glad to consider any words or sentences in the statement which is plaintiff's Exhibit 1 which you think bear you out in that.

Mr. Turner: It is the first three paragraphs.

The Court: Of the first two paragraphs, you have already cross-examined everybody, have you not, as to the Ford Motor Company's relationship? Do you wish to cross-examine Mr. Mein about the business relationship at the Ford Motor plant?

Mr. Turner: No, your Honor, about what he

was told at the time of his interview with Mr. Verner, about the background and relationship between Mr. Verner and Mrs. Thornquist. [76]

The Court: I am asking you now if there are any other statements in any paragraph below the second paragraph as to which you have not sufficiently cross-examined Mr. Mein. As I understand it, you have already cross-examined Mrs. Nelson and Mr. Fardon relating to paragraphs 3.

Mr. Turner: I would answer that I see no other.

The Court: Mr. Evans, what have you to say with respect to the request to cross-examine Mr. Mein on paragraphs 1 and 2 of this statement, Plaintiff's Exhibit 1?

Mr. Evans: The material issues which the government is required to prove here and the only issues involved are whether or not this defendant mailed these letters and whether or not he knew he shouldn't have mailed them, it was against the law, and whether or not they are lewd, lascivious and filthy. Those are the only issues involved here. I see no reason for bringing in any other issues to try to confuse the jury. Obviously that is all counsel wants to do, to confuse the jury. The jury shouldn't have to sit here and listen to a great deal of extraneous matters that have no bearing on this case.

It makes no difference what the relationship of any of these parties was to each other in the past. It is an offense to mail this type of communication and as in the 160 F. case, if someone wants to

transmit this type of communication, he is going to have to do it by some other means than by the mail. The only issues in this case are whether or not it was mailed by this defendant, whether or not he knew it was wrong to do it, and whether or not it was actually lewd, lascivious and filthy. I see no reason for bringing in anything else for the jury to consider.

The Court: I am inclined to think that since this exhibit was not in at the time the Court sustained the previous objection to inquiring about paragraph 1 and 2, he should have an opportunity to cross-examine Mr. Mein about it after the exhibit is admitted, and that will be done, but it is possible after this is done and after the government's case is opened up for that purpose that later on after the plaintiff rests and the defendant accedes to the resting of the plaintiff's case in chief, that this defendant may wish to make a motion in the absence of the jury.

Mr. Turner: Yes, your Honor.

The Court: Is it possible for the defendant to save the jury's and the Court's time and make that motion now?

Mr. Turner: I will be glad to cooperate. [78]

The Court: You may tell the Court now what you offered to prove on this cross-examination of Mr. Mein respecting paragraphs 1 and 2 of this statement, if you wish to do so, if you feel that will have any bearing upon the plaintiff's right and the propriety of the Court's ruling on the ques-

tion of whether or not the plaintiff will have a right notwithstanding your cross-examination on those two paragraphs to have this case in its present status submitted to the jury, supposing no other evidence should be submitted to the jury, if it is agreeable to the defendant.

Mr. Turner: If your Honor please, that is agreeable to me and I am glad to cooperate.

So far as the further cross-examination of Mr. Mein is concerned, I do not have any reason to suppose that anything would be elicited to affect the sufficiency of the evidence, but so far as the matter of the effect upon these witnesses in my offers of proof as to the effect of receiving the letter upon Mr. Fardon and Mrs. Nelson, my theory is that I should have the benefit of that.

The Court: I am going to let you cross-examine the witness, Mein. I wonder if you will be able to save any time.

Mr. Turner: With that understanding, I challenge [79] the sufficiency of the evidence for the government and move for a directed verdict of acquittal on the ground that no offense has been proved, that the cases submitted to your Honor show that there must be in order to violate the Statute a mailing of a document which under the circumstances is calculated to deprave and corrupt the morals of the addressee, and that the evidence is not sufficient to show that or to warrant the jury in coming to that conclusion beyond a reasonable doubt.

The Court: I wish counsel to know that if he wishes, the Court will deem this motion made at the close of all the government's case in chief, when the government has finally rested its case in chief, and I also wish to advise counsel now that unless the Court's opinion is changed by this further cross-examination of the witness, Mein, that the Court will probably overrule this motion and challenge and deny the motion.

The ruling is reserved until that time, until after the case in chief of the government is finally rested and at that time I will give you an opportunity to say for the record that you wish the Court to rule upon your pending motion, if you will. In that way the matter can be disposed of.

Mr. Turner: As far as the defendant is concerned, there is no objection to putting that direction in the [80] record right now and consider this the ruling.

The Court: I will reserve ruling.

Mr. Turner: I want the Court to know that I am prepared to argue that. I presume the Court would like to save time since the question could be presented later.

The Court: I am positive that in the view I have of the evidence, the Court should permit the plaintiff to go to the jury on the evidence the plaintiff has adduced, assuming as the Court must at this stage or at the stage when the plaintiff rests that there is no other evidence in the case. Do you understand that?

Mr. Turner, Yes, your Honor.

Mr. Evans: On counsel's own statement, he expects to elicit nothing from Mr. Mein to affect the sufficiency of the evidence. The government has rested twice. I see no reason why the government should have its case kept open while he puts on his defense.

The Court: I think we are all taking up unnecessary time. I do not understand that Mr. Turner meant literally those words. I realize that one might argue that that might be the effect of the words. I think what he really meant was that while the evidence was important to his side of the case, he did not believe it would affect the plaintiff's right to go to the jury [81] at the close of the plaintiff's case in chief, but he probably had the idea, as I understood him, even though he did not perhaps express it as fully as you may think he should have, that he would argue to the jury that this evidence had some bearing upon the guilt or innocence of the defendant.

Mr. Evans: If that is a matter of the defense, he has every right in the world to present it on his part of the case.

The Court: The Court will permit the request of the defendant to open up the government's case in chief for the purpose of this further cross-examination of the witness, Mein. Bring in the jury.

(Jury returns.)

The Court: All the jurors have returned to their places as before. The government's case in chief

is opened up for the purpose of further cross-examination of the witness, Bernard Mein. He will resume the stand.

BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [82]

Cross-Examination

By Mr. Turner:

Q. When Mrs. Verner called you in response to the letter that you had mailed to Mr. Verner, this was approximately some time in November of 1948, was it, or when was it?

A. It was in November, 1948, yes, about November 25th, I believe, it was probably November 25th or 26th.

Q. You had not at that time talked to Mr. Verner?

A. No, I wrote him a letter to call at my office.

Q. How long after Mrs. Verner called you did you talk to Mr. Verner?

A. She said she would show him my letter and ask him to come down, so I presume it was a day or two later.

Q. You are presuming, do you know?

A. It was probably two days later.

Q. That is just an estimate?

A. One or two days later, yes.

(Testimony of Bernard Mein.)

Q. It was substantially at the same time, wasn't it?

A. Well, it was sometime later.

Q. Within possibly a day or so?

A. Within a day or two after she called me.

Q. At the time Mrs. Verner called you, she told you something about the background of this case, didn't she? [83]

Mr. Evans: I am going to object to any testimony by this witness in regard to anything Mrs. Verner may have told him unless it was in the presence of the defendant. What this is is an obvious attempt to get the testimony of Mrs. Verner on without subjecting her to cross-examination.

The Court: The objection is overruled to the present question. It may be renewed if counsel is so advised upon later questions.

A. I don't recall that she did. I was just trying to get in touch with Mr. Verner. She said when he came home she would show him the letter.

Q. Is that all that was said?

Mr. Evans: I am going to object to anything more that was said.

The Court: The objection is sustained as to what she said.

Mr. Turner: The witness has gone ahead spontaneously and related part of what was said.

The Court: You had a right to object to the spontaneous statement.

Mr. Turner: I move that that be stricken.

The Court: It is stricken. The jury will dis-

(Testimony of Bernard Mein.)

regard it, with respect to what Mrs. Verner said.

Q. Didn't she tell you anything about the previous [84] relationship between Mr. Verner and Mrs. Thornquist?

Mr. Evans: I am going to object to that. It is immaterial as to whether she told him anything or not, and what she did tell him wouldn't be admissible anyway.

The Court: The objection is sustained.

Mr. Turner: That is all.

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Evans: The government rests.

The Court: Is there anything further?

Mr. Turner: May it be understood that the motion and ruling previously made——

The Court: The government now rests and the Court deems as now made the motion and challenge which has been previously noted and the Court does overrule the challenge and deny the motion.

The defendant may now proceed.

(Opening statement made on behalf of defendant.)

The Court: Call defendant's first witness.

Mr. Turner: Mr. Gardner. [85]

HARRY E. GARDNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you state your name, please?

A. Harry E. Gardner.

Q. What is your occupation? A. Minister.

Q. Where do you reside?

A. Sumner, Washington.

Q. You are the pastor of a church there?

A. Yes, sir.

Q. Do you know the defendant, Mr. Ernest Verner?
A. Yes, sir, for seven years.

Q. At the time you first became acquainted with him, in what connection was it?

A. He was Sunday School treasurer, handled some five or six hundred dollars for them, doing it effectively, regularly, faithfully.

Q. At that time, were you the pastor of the church at which Mr. Verner attended? [86]

A. Yes, Trinity Methodist Church.

Q. That was here in Seattle? A. Yes, sir.

Q. Where is it?

A. West 65th Street and 23rd Avenue North West.

Q. Of course you knew Mrs. Verner, too?

A. Yes, Mrs. Verner, her family and sister and their family and Mr. Verner's mother.

(Testimony of Harry E. Gardner.)

Q. Will you state whether or not Mr. Verner was an active member of that church?

A. Yes, very much so.

Q. Did you have relatively much or little occasion to see him and to know him?

A. Oh, at least once a week, frequently twice.

Q. Do you have an opinion as to whether or not he was a man of good moral habits?

Mr. Evans: I am going to object to that as to the word "was." I think the pertinent issue—I presume this is a character witness—is what he is now.

Mr. Turner: The pertinent question is at the time of the witness's knowledge. I will withdraw that question now and ask another preliminary question.

The Court: You may do that.

Q. During what years were you the pastor of Trinity Methodist Church? [87]

A. From seven to four years ago, it is three years ago for a period of four years.

Q. From about 1942 to 1946?

A. That is right.

Q. During that period and subsequent to that time, have you had occasion to see very much of him or to know very much about him?

A. Since that period of four years?

Q. Yes.

A. Not so much, of course, not a great deal.

Q. During that period of time when you were

(Testimony of Harry E. Gardner.)

pastor at the church, did you have an opinion as to his moral character?

A. Yes, I did, on the basis——

Q. Will you state what that opinion was?

A. I considered it of the very finest kind. His mother is a good old German woman that brought up a family in strictness, in the finest way, and he had followed in those——

Mr. Evans: I am going to object to this testimony in regard to his mother.

The Court: The objection is sustained. Confine the questions and answers to the defendant.

The Witness: Thank you. My relationship with Mr. Verner was always that he was dependable, that he [88] was just A-1 I guess you would say. He was such that I felt very much—very confident of him in every respect.

Q. Was that true of the entire period in which you were pastor there?

A. I am glad for that question, because——

The Court: Do not make any further comment. Just answer the question directly. Read the question.

(Last question read by reporter.)

The Witness: No.

Q. Will you explain just how your opinion changed of him as based upon your knowledge of him, changed during the period of time when you were pastor of Trinity Methodist Church?

A. When he began to become irregular, when

(Testimony of Harry E. Gardner.)

he began to have some night duties or activities or interests, whatever that may have been, that led to irregularity; and the period of the second summer I think or the third, when he was acting as treasurer for the race track through the summer period or fall period, taking him away from his active duties, although he continued his work for some time under those circumstances and did it well.

Q. Did you have occasion as pastor of that church to find out the cause of this irregularity on the part of Mr. Verner? [89]

A. I did.

Q. What was it?

A. Interest in a woman, or a woman's interest in him.

Q. Do you know the name of that woman?

A. I have heard it again and again. I have never known it personally.

Mr. Evans: I am going to object to this line of testimony. As I understand it, this witness is called as a character witness. I believe he can testify as to character but I don't believe what he is going into now——

The Court: What is the theory of admissibility?

Mr. Turner: The theory of admissibility bears on the background and circumstances of why he sent the letter. The government has put in evidence a statement which in paragraph 2 bears on

(Testimony of Harry E. Gardner.)

this very matter I am now asking about. I am trying to give the rest of the circumstances.

The Court: How do you avoid the hearsay rule?

Mr. Turner: Well, I will concede that if there were no other evidence that there was a relationship between the defendant and Mrs. Thornquist, this would be subject to being stricken, but so far as this witness is concerned, I think that he is entitled to fix the time of the change in Mr. Verner's character [90] and habits with reference to the time he ascertained from his investigations as pastor of his church about the Thornquist matter.

The Court: The objection is sustained. Ask him another question.

Q. Did you ever speak to Mr. Verner about any association with Mrs. Verne Thornquist?

Mr. Evans: I am going to object to that as being irrelevant.

The Court: Sustained.

Q. Did you say whether or not Mrs. Verner ever brought that problem to you as pastor of the church?

Mr. Evans: I am going to object to that. Any conversation between this witness and Mrs. Verner would not be admissible.

The Court: Sustained.

Q. Prior to the time when he became involved with Mrs. Thornquist, would you state whether or not in your opinion he was a law abiding citizen?

A. Very much so. If I may volunteer a state-

(Testimony of Harry E. Gardner.)

ment, that is definitely on him, I wrote him a letter at the very worst time of this period under my ministry.

Mr. Evans: I am going to object to this voluntary statement.

The Court: The objection is sustained. [91]

Mr. Evans: And I ask that it be stricken.

The Court: There is nothing in it except that he wrote him a letter. The request that it be stricken is denied.

The Witness: If the Court would——

The Court: There is nothing before the Court. Proceed by question and answer.

Q. Do you know the reputation of Mr. Verner for truth and veracity?

A. I would think it is far above the average.

Mr. Turner: That is all except for certain offers of proof. Should I make them now or later?

The Court: Later. Is there any cross-examination?

Mr. Evans: No cross-examination.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner: May Mr. Gardner be excused?

Mr. Evans: No objection.

Mr. Turner: I would like to reserve the right to recall him in case the Court should consider that that evidence——

The Court: You may do that.

Mr. Turner: Mrs. Verner. [92]

MARGARET VERNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. Margaret Verner.

Q. You are the wife of the defendant in this case? A. I am.

Q. When and where were you married to Mr. Verner?

A. We were married August 20, 1926, in Everett, Washington.

Q. You are now living on 67th Street West?

A. West 67th, yes sir.

Q. You have lived there for quite a number of years?

A. A great many years, yes, some years before I was married even.

Q. Was there any trouble in your married life prior to the time Mrs. Thornquist entered into it?

A. Never.

Mr. Evans: I am going to object to this as being highly irrelevant. It has nothing to do with the issues in this case. Trouble between this defendant and his wife is not the subject of this lawsuit.

The Court: Mr. Turner, would you indicate what you expect to establish?

Mr. Turner: It bears on paragraph 2 of Plain-

(Testimony of Margaret Verner.)

tiff's Exhibit 1, if Your Honor please and also on Exhibit 3. This question has not reached paragraph 3 of Exhibit 1 but there is a certain statement that Mr. Mein put into Government's Exhibit 1 in paragraph 3 that we dispute on the facts and I desire to establish the facts, but again I will have to lead up to that part.

The Court: The objection is overruled.

Mr. Evans: May I address the Court on that subject?

The Court: You may do so.

Mr. Evans: If counsel had any objection to the second paragraph of Plaintiff's Exhibit 1, he had ample opportunity to make objection to it at the time it was introduced. Those are only incidental matters which are normally placed in a statement primarily to show that they were not written by someone else, to show that actually it was the person who signed the statement that actually signed it.

The pertinent issues in this lawsuit are not whether or not a divorce was ever started between this defendant and his wife. The only issues involved are whether or not he mailed these letters, whether or not [94] they were lewd, lascivious and filthy and whether or not he knew they were of such character at the time he mailed them.

Those are the only issues the Statute provides the government must prove, and all those other extraneous matters have no bearing on this case. don't think the jury should have to listen to them.

(Testimony of Margaret Verner.)

The Court: The objection is overruled. Be direct and to the point.

Q. Do you understand the question?

A. You asked me if there had ever been trouble between me and my husband before Mrs. Thornquist——

Q. That is right.

A. There never had been.

Q. When did Mrs. Thornquist first become involved in the married life of you and Mr. Verner?

A. When she started working with him.

Q. Where was that?

A. At the National Bank of Commerce.

Q. Did Mr. Verner at that time have a position with the National Bank of Commerce?

A. Yes he did.

Q. What was his position?

A. I don't know exactly what his title was. He was in the bond cage, I think, where they sold government bonds. [95]

Q. You haven't given the year when that happened.

A. I don't remember the exact year. It was before the end of the war.

Q. At any time did Mrs. Thornquist make any statement to you as to what her intentions were with respect to Mr. Verner? A. Yes.

Mr. Evans: That is objected to as being hearsay, has no bearing on this case.

The Court: Sustained.

(Testimony of Margaret Verner.)

Mr. Turner: If the Court please, that is a very material point and I would like to be heard about it.

The Court: I will hear you in the absence of the jury at the next call of the recess, but not now. The objection is sustained. I will hear you later. The witness will be available in case the Court reverses its ruling.

Q. What did you observe with reference to your husband and Mrs. Thornquist from the time she went to work in the same cage or department with him at the bank—by the way, could you give an approximate year when that occurred?

A. I would say 1944 or 1945. I am not sure.

Q. It is somewhere in there?

A. I never keep track of dates.

Q. Then what did you observe? [96]

A. Well, at first he started working late and coming home and neglecting the yard, and he had to work Sundays, and when he didn't call me—he used to call me every day to tell me what time he would be home for dinner. Finally, Mrs. Thornquist began answering the phone, wouldn't let me talk to him, said she was going to take him from me.

Mr. Evans: I object to that line of testimony.

The Court: The objection is sustained.

Mr. Turner: To how much, Your Honor?

The Court: The objection is sustained as to what she said.

Q. Did you observe anything in the way of gifts or letters that he brought home? A. Yes.

(Testimony of Margaret Verner.)

Mr. Evans: I object to this line of testimony. This doesn't refer to anything that is in Exhibit 1.

The Court: What statement in Exhibit 1 is this question referring to?

Mr. Turner: Paragraph 2, Your Honor, and also paragraph 3. Those two paragraphs are couched in language to cast the very plain inference that Mr. Verner was the aggressor in that illicit relationship, and the fact of the matter is just the reverse. In drawing that up, Mr. Mein has so written it that it looks like Mr. Verner tried to carry on that affair and [97] was unsuccessful and became angry and so did this thing, and it is just the opposite of the truth. We are entitled to show those facts, the government having injected it.

The Court: You may ask her concerning the fact involved, without asking what was said by the person or any persons not now present.

Mrs. Evans: May I be heard further on this?

The Court: I will hear you further at the recess. You may proceed.

Q. The question called for any letters or gifts or things he brought home emanating from Mrs. Thornquist?

A. It started with boxes of home made fudge and angel food cakes and progressed to ties and shirts and things in which he would be very much embarrassed about bringing home, and he would say, "This isn't my taste. I don't know what made me buy it."

(Testimony of Margaret Verner.)

Q. Were there any letters brought home?

A. Yes letters every place, and very sentimental cards.

Q. Did you examine them?

A. Some of them, yes.

Q. Will you state the general character of them as to whether they were business letters, love letters or what they were?

Mr. Evans: That is objected to. [98]

The Court: Sustained.

Q. At any time, did your husband leave home?

A. New Year's Eve, 1946.

Q. At that time did Mrs. Thornquist call at your home and make any demands?

Mr. Evans: I am going to object to this as being hearsay.

The Court: It is sustained.

Mr. Turner: If Your Honor please, I hadn't finished my question. I am not asking for hearsay testimony, Your Honor. I wanted to ask whether or not she had made a certain demand or request. It is not a statement of fact.

Mr. Evans: What difference does it make whether counsel or the witness testifies.

The Court: The objection is sustained.

Q. About when was it that Mr. Verner left?

A. New Year's Eve, 1946.

Q. Would that mean December 31, 1946 or December 31, 1945?

A. 1945, I guess, the 31st of December.

(Testimony of Margaret Verner.)

Q. Was any action for divorce instituted against you by him? Were you served with papers?

A. I was served with papers.

Q. Will you state whether or not you defended that action? [99]

A. I did. I got you to contest it in case it was necessary but it wasn't.

Q. It was ultimately dismissed?

A. It was.

Q. State whether or not Mr. Verner came back home to live with you.

A. Some time before, yes.

Q. Some time before what?

A. Some time before it was dismissed.

Q. He was gone about six months or so, was he?

A. Less than that.

Q. Did you observe any actions by Mrs. Thornquist? A. Yes, she said she wouldn't have it.

Mr. Evans: I am going to object to anything she said.

The Court: The objection is sustained.

Q. The question was for actions.

A. She tried to break in the house. She attacked me at my front door. She tried to wreck our car when we were both in it. She would park out on the corner and watch the house. She stood in our back yard under the window and peeked through the window.

Mr. Evans: I object to this line of testimony as being irrelevant and immaterial. If counsel wants

(Testimony of Margaret Verner.)

to put in evidence that the defendant did not intend to [100] marry Mrs. Thornquist, the defendant here can answer that, as to what his intentions were. As to whether or not divorce proceedings were started on one, two or three occasions, that can be testified to very quickly without all the testimony which has been offered.

The Court: What has been said will stand. You may ask her another question.

Q. You have referred to a number of incidents, and you haven't characterized whether or not the manner of—for example, you said something about beating on the door or trying to break in the house. Was that violent, non-violent, or what happened?

A. It was violent.

Q. About how long ago was it?

A. Well, December, 1947, and after that she knocked me down on the street.

Q. On any of these occasions when she came out to the house, did you have to call the police?

A. Yes I did.

Q. What did the police do about that?

A. They arrested her, took her down to the Ballard station.

Q. How about the time she knocked you down on the street? What were the circumstances there?

A. Well, she didn't want my husband to take me home. [101] She wanted him to take her home.

Q. How did this come about?

(Testimony of Margaret Verner.)

A. Well, we were standing on the corner and she was——

Q. When you say we, who do you mean by we?

A. My husband, Mrs. Thornquist, and myself, the three of us.

Q. Had the three of you been out together or something? A. No.

Q. Tell just how this happened. It is not clear the way you are telling it.

Mr. Evans: I am going to object to this again.

The Court: The objection is sustained. Ask her another question.

Mr. Turner: If the Court please,——

The Court: You may have an exception.

Mr. Turner: Yes.

The Court: You may proceed.

Mr. Turner: I don't want to interfere with the Court's ruling, but I don't understand the theory.

The Court: The Court directs you proceed with another question. The objection is sustained.

Q. At any time, did you and Mr. Verner leave town in an endeavor to get away from her?

A. Yes, we went to California, because she had been out there four times in one day, making a scene, and it was [102] rather embarrassing so we went down to California and stayed for several months.

Q. During what year was that?

A. That latter part of 1945. We went in October and came back Christmas.

(Testimony of Margaret Verner.)

Q. Referring to this incident when Mrs. Thornquist knocked you down on the street, was she arrested at that time?

A. Not that evening, but she was.

Q. Did you make a complaint to the authorities about it? A. Not for a couple of days after.

Q. I am not asking the time. Did you?

A. Yes I did.

Q. What was the result of those proceedings?

A. She was put under a peace bond.

Q. That was in Justice Court here in Seattle?

A. Yes it was.

Q. You have told about her chasing you in the car, trying to wreck the car. How did she do that?

A. We had been parked on First Avenue and she saw our car.

Q. When you say we, who is that?

A. My husband and myself.

Q. You were in your car? [103]

A. In our car, so she just followed us and kept ramming into the car and got ahead of us and tried to wreck us by running into us head-on, trying to force us into parked cars on Fourth Avenue, so we drove to the Police Station and they told her to go home. We were free to go home then. That evening when it was dark, we tried to sneak home but she caught us, wouldn't let us on the driveway. We were afraid our car would be wrecked so we drove madly around Ballard trying to escape her. In a service station finally at 70th and 15th—

(Testimony of Margaret Verner.)

Q. During all this period of time when Mrs. Thornquist was carrying on this pursuit and harassment, was Mr. Verner living at home with you?

A. Yes, he was.

Q. At any time, did you go to any other city besides this one in California you mention?

A. We moved to Spokane but she found out where we were and came over and made things very unpleasant so we went to San Francisco.

Q. Did you observe during this period of time when Mrs. Thornquist was pursuing in this fashion, that there was any strain or effect upon Mr. Verner?

A. Yes, there surely was. He finally got so desperate because he couldn't get away from her that he tried to commit suicide. [104]

Q. Did you find out what he did? A. Yes.

Mr. Evans: I object to this unless it is within her personal knowledge.

Mr. Turner: That is what I am asking her, her personal knowledge.

The Witness: I was there.

The Court: You may relate it.

Q. What was it?

A. He took about forty phenobarbital tablets.

Q. Those are what they call sleeping tablets?

A. Yes. I had a doctor who spent almost three days bringing him out of this. He didn't give me any hope at all at first and then during this time Ernest told me all about the whole thing and the practically blackmail that she was using.

(Testimony of Margaret Verner.)

Q. Did she make any attempt to follow you at any time down in California?

A. Well, the first time we went, I don't know how she ever guessed where we were but she—

Q. Just eliminate those side remarks.

A. She called long distance twice.

Q. Where did she locate you at that time?

A. At San Mateo. We were living in an auto court.

Q. At any time prior to the sending of this letter [105] did she cease her pursuit of Mr. Verner and the annoyance of yourself?

A. No, not entirely.

Mr. Turner: If the Court please, I have certain offers that I would like to make but other than that, I would like to conclude my direct examination, reserving the right to make the offers.

The Court: Is there any cross examination?

Mr. Evans: No cross-examination.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner. Mr. Horton.

GEORGE W. HORTON

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. George W. Horton.

Q. Do you live here in Seattle? [106]

A. That's right.

Q. What is your business?

A. Service Station.

Q. Where is the service station where you are employed? A. 70th and 15th North West.

Q. In Seattle? A. That's right.

Q. You have been employed there for some time? A. Four years.

Q. Do you know Mr. and Mrs. Verner?

A. I do.

Q. That is the defendant in this case and his wife? A. Yes.

Q. Did you ever have occasion to see Mrs. Verne Thornquist? A. Once.

Q. You were present in court and heard Mrs. Verner's testimony? A. Yes.

Q. Did she refer in her testimony to the occasion on which you saw Mrs. Thornquist?

A. She did.

Q. Will you tell the jury just what happened on that occasion in your own words—that is, just confine it to [107] what you saw and heard.

(Testimony of George W. Horton.)

A. The two cars came in almost together, and Mr. Verner stopped and this woman got out and started using some rather vile language and names. When I asked her what the trouble was, she told me it was none of my business. Mrs. Verner asked me if I would come around to the other side of the car and she told me to call the police, which I did. Just before they got there, she got in her car and left.

Q. You say this woman used vile language and called him names and so forth. Are you referring to Mrs. Thornquist?

A. That's right. I guess that's who she was. I didn't know her.

Q. Describe the manner in which she did that. Was it in a soft spoken voice or loud?

A. It was rather a loud voice.

Q. I am not going to ask you to repeat any vile language, but what was the substance of what she said if you know or remember?

A. Well I don't remember that actually. I do know that she seemed to be directing it mostly at Verner, some awful names she was using. I don't know what the implication was, I didn't catch that part because it all happened so quick. She asked me to call the police and I walked in to call them and when I come out, she was gone. [108]

Q. Did you notice these cars before they came to a stop in your service station?

A. Yes, they went through once.

(Testimony of George W. Horton.)

Q. They went through the station?

A. Yes.

Q. Not in the street, but through the station?

A. That is right.

Q. You are on a corner, are you? A. Yes.

Q. And at what speed did they go through the station?

A. I would say about 35 or 40 miles an hour.

Q. Which car was in front and which was following? A. He was in front.

Q. That is, Mr. Verner was in front?

A. Yes.

Q. Mrs. Thornquist was coming behind, is that right? A. That is right.

Q. They were still that way when they went around the block and came back and came to a stop in your station?

A. That is right. He came in first.

Mr. Turner: That is all.

Mr. Evans: I have no cross examination.

The Court: You may step down.

(Witness excused.)

The Court: At this time the jurors are excused until [109] tomorrow morning at 9:30. You may now retire under the Court's previous admonitions.

(Jury retires.)

Mr. Turner: May the witness, Horton, be excused?

Mr. Evans: I would like to have Mrs. Nelson and Mr. Fardon excused, at least subject to being called by telephone.

Mr. Turner: I have no objection.

The Court: Mrs. Nelson and Mr. Fardon are excused subject to telephone call.

Mr. Turner: And the same also about Mr. Gardner?

The Court: The same is true of Mr. Gardner. He is likewise excused subject to telephone call.

I will hear either counsel in whatever they wish to address to the Court's attention.

Mr. Turner: With respect to the challenge, Your Honor, I just want the Court to know that I would be glad to attempt to discuss the theory behind the challenge if the Court desires it or if it would be regarded as helpful. I don't want to be in a position of not having offered to make it. I don't want to press it upon the Court if the Court believes he understands my objection.

The Court: I believe I do. The only thing I am anxious for you to have is an opportunity to make your [110] record. Is there anything indispensable to your making a proper record for you to say? If there is, say that, and if there is not, then the Court is satisfied and I do not believe there is any chance that the Court will change the ruling. I repeat, make no further statement in that regard except one you believe is absolutely indispensable for you to preserve a valid record.

Mr. Turner: I don't know whether the record shows that I did submit to the Court the defendant's memorandum of authorities for the use of the trial court.

The Court: I have a trial brief.

Mr. Turner: My theory is largely set forth in there as well as I could present it orally. Frankly, I am not aware of anything additional I could offer now.

I offer to prove by the witness, Margaret Verner, that in a conversation on the telephone early in Mrs. Verner's knowledge of Mrs. Thornquist, Mrs. Thornquist made the statement that she was going to take her husband, Mr. Verner, away from her, Mrs. Verner.

The Court: Is that all?

Mr. Turner: That is all of that offer.

The Court: What is the attitude of the government towards the offer?

Mr. Evans: That certainly has no bearing here. After [111] all, this statement is signed by the defendant, Your Honor. It is his statement, his signature is on it. There was no objection to this statement going in. Apparently it is true or else the defendant himself can take the stand and deny it if is not true. Anything that was said by anybody else to Mr. Mein is not material to the issues here.

This is a statement signed by the defendant. Mr. Mein has testified at the time Mr. Verner signed it, acknowledged to him that it was true, and that is all the testimony in reality that Mr. Mein has testified to and all that is pertinent. I cannot understand why or under what theory all of the defense's evidence thus far has been admissable. It certainly doesn't have anything to do with whether or not

this defendant did or did not mail these letters, whether or not they are lewd, lescivious and filthy, and those are the only issues in this case. I fail to understand where or how we can get off into trying a divorce action.

The Court: I understand this last offer concerns something said by Mrs. Thornquist?

Mr. Turner: That is right.

The Court: The objection is sustained.

Mr. Turner: If the Court please, we are offering that not for the proof of the facts stated, but as a [112] verbal act to disclose the attitude of Mrs. Thornquist as to whether or not this defendant or Mrs. Thornquist was the aggressor in that relationship.

The Court: I think the proof on that is ample so far. The objection is sustained.

Mr. Turner: I also offer to prove by the witness Mrs. Verner that subsequently and at about the time of the institution of this divorce proceeding—probably slightly before, I am not advised of the precise date, but it is approximately at that time, sometime in 1945, the latter part of 1945—Mrs. Thornquist in the presence of her own mother, Mrs. Dexter, called at the Verner home and in the presence of the defendant and Mrs. Verner, Mrs. Thornquist made a demand upon Mrs. Verner to give up her husband so that she, Mrs. Thornquist, could marry him.

Mr. Evans: That certainly is not relevant to any of the issues here. It is entirely hearsay. It is objected to by the government.

The Court: The objection is sustained.

Mr. Turner: May I have an exception to the ruling?

The Court: Allowed. Is there anything else that anyone wishes to mention in the absence of the jury?

Mr. Evans: I don't know how long we are going to have the type of testimony that we have had here. [113] I would like to remind the Court of the ruling in the Knowles case, the prosecution for depositing obscene matter in the mails: "The purpose of the defendant is immaterial, and that his motive was good is no defense." It seems to me that is what the defense is trying to put in here.

The Court: Will you give me the citation of the Knowles case?

Mr. Evans: 170 F. 409.

Mr. Turner: If Your Honor please, I intended to make this comment on counsel's position before. I don't know whether counsel is going so far as to admit that the first three paragraphs contained in Exhibit 1 which the government prepared have no bearing on the case. If that is his admission, I submit it still is not a valid argument.

They put the matter in, and they put in the manner, which would cast the defendant in a bad light, and it now does not lie in the government's mouth to say that it is inadmissible because it is there, and it is in the evidence, and they did it and I think we are entitled to repel that unfavorable inference which the government has cast upon the defendant

because of the relationship alleged in that statement.

However, if that is counsel's position, I still [114] don't understand it. If that is not his position, and if his position is that these first three paragraphs are admissible and relevant, as to which I think he is right in part, then we are entitled to get in the whole background, not just the portion the government selects.

The Court: I would think that the defendant cannot very well complain about the extent of the background that the Court has indulged so far. The Court is of the opinion that all of this is immaterial. If it was not in this statement, the Court of course would not hear any testimony of this sort.

It seems to me there should be some limit on the extent of the reception of this testimony, even when the subject was introduced by the government, and the theory on which the Court is acting is to give the defendant a reasonable opportunity to make any explanation of the things stated in those paragraphs. I believe that what has occurred already is a reasonable indulgence to the defendant in that regard, with the possible exception of any statements he might make in the defendant's case in chief when the defendant is called as a witness.

Is there anything else? I ask counsel on both sides to again search the authorities and see if there is anything in the authorities that definitely overrules [115] the rule announced in 160 F. at 706.

All parties and counsel are excused until tomorrow morning at 9:30.

(At 5:15 o'clock p.m., Tuesday, July 12, 1949 proceedings adjourned until 9:30 o'clock a.m., Wednesday, July 13, 1949.)

Seattle, Washington

July 13, 1949, 9:30 o'Clock A. M.

The Court: May the record show call of the jury is waived and that all jurors are present and also all parties on trial with their counsel.

Mr. Evans: The government agrees the record may so show.

Mr. Turner: Defendant agrees.

The Court: The defendant may now proceed.

CHESTER G. MacMILLAN

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. Chester G. MacMillan.

Q. Where do you live? A. Poulsbo.

Q. What is your business?

A. I am a retired banker engaged in the building effort for myself at the moment.

Q. And your business is in Seattle, is it?

(Testimony of Chester G. MacMillan.)

A. That's right.

Q. Formerly you were in the banking business?

A. Yes sir.

Q. What bank?

A. The National Bank of Commerce and its predecessor.

Q. How long have you been with that bank?

A. Twenty-five years and two months.

Q. When did you leave?

A. February 1, 1947. [117]

Q. While you were with the bank, did you know the defendant, Ernest Verner?

A. Very well.

Q. Was he then associated with the bank?

A. At the time I left, you mean, or when I was there?

Q. While you were there.

A. While I was there, yes.

Q. How long had he been with that bank?

A. He was with the National City Bank and in February of 1929 the National City Bank became part of the National Bank of Commerce so he was with the National Bank of Commerce from February 1929 until the time he left.

Q. When was that?

A. I am not too sure at the moment, I haven't given it any thought.

Q. Approximately? A. 1946.

Q. What was your position in the bank?

(Testimony of Chester G. MacMillan.)

A. Assistant cashier and head office administration.

Q. In that respect did you have charge of personnel at the bank?

A. No, I had an interest in the personnel in my particular department and personnel in the head office and its branches, generally speaking, that is part of the administrative work on the part of the head office. We are [118] not actively interested in it in the sense that you are an administrative officer of the personnel department.

Q. Were you familiar with Mr. Verner's reputation for truth and veracity?

A. Very familiar.

Q. Were you familiar with his reputation for being a law abiding citizen, good character?

A. In the work that he was doing, he had to be.
Mr. Evans: I didn't understand that answer.

Q. Mr. MacMillan, the question was, did you know? I am trying to find out whether you knew what the character was.

A. Yes, I made it a point to know.

The Court: He made a voluntary answer and counsel for the plaintiff said he did not understand it. Do you wish it stricken?

Mr. Turner: It is up to the government, Your Honor.

The Court: Read the answer.

(Answer read by court reporter.)

(Testimony of Chester G. MacMillan.)

The Court: You may proceed and the answer will remain in the record.

Q. What was his character, integrity and honesty?

A. In the particular kind of work Mr. Verner was engaged in——

The Court: Answer directly. [119]

Q. The proper answer for you first to tell is whether that is good or bad as your opinion may be and then if you want to qualify it or explain it, you can add that afterwards.

The Court: Answer good or bad, whichever in your opinion it was.

The Witness: Very excellent.

Q. What was his reputation for truth and veracity? A. Very excellent.

Q. What was his character for being a law abiding citizen of good morals?

A. Still very excellent.

Q. What position did he hold in the bank at the time he left?

A. He was what you would call my administrative assistant, in all the matters in which I had an interest in the bank.

Q. Then you had very close supervision and detailed knowledge of his work and character there at the bank? A. Very close.

Q. Will you state whether or not Mrs. Verne Thornquist was employed at the bank?

A. She was.

(Testimony of Chester G. MacMillan.)

Mr. Evans: I am going to object to that question and ask that the answer already given be stricken. That is not a material issue in this case, as to where [120] Mrs. Thornquist worked or ever worked.

The Court: What bearing does it have?

Mr. Turner: The letters which form the basis of the charge refer to her employment at the bank, Your Honor.

Mr. Evans: The truth or falsity of what may be in these letters is not the issue here. The only issues are whether or not this defendant mailed them and whether he knew he shouldn't and whether they are lewd, lascivious and filthy.

The Court: The objection is sustained.

Mr. Turner: You may cross examine.

Cross Examination

By Mr. Evans:

Q. You have testified on a number of points of character of the accused here. Are you testifying from your own personal knowledge or from what other people have told you?

A. My own personal knowledge, sir.

Q. Then your opinion here as to his character as you have outlined is not based on anything else anyone else has told you?

A. Absolutely not.

Q. Strictly on your own personal knowledge?

A. Yes sir.

Q. Your own opinion?

A. Yes sir.

Q. Do you live in the community where he lives?

(Testimony of Chester G. MacMillan.)

A. Not now. I did at this time.

Q. What?

A. I lived in Seattle at this time. I don't live in Seattle now. I just work here. How did you mean your question?

Q. That is during the period of time you were speaking about when you say you knew his reputation?

A. I was a resident of Seattle.

Q. Did you live in the same neighborhood he lived in?

A. He lived in Ballard and I lived out in the University district.

Q. About two or three miles apart?

A. That is right.

Q. You are certain none of this information you have given here was gained from talking with other people?

A. I can amplify that or I can answer just plain no.

Mr. Evans: I move that this witness's testimony as to his reputation be stricken. It is his own opinion, it is not based upon his reputation. Reputation is based upon what other people think about it.

The Witness: I was not paying any attention to [122] the words. I am sorry.

Mr. Turner: I don't think the cross examination demonstrates the ground on which the government relies. I know that it is susceptible to that construction but I don't think it is a fair appraisal. I think the questions were leading and they had a legal

(Testimony of Chester G. MacMillan.)

significance that the witness did not appreciate. I think I should be allowed to develop further—on direct examination, he testified that he knew that reputation and I don't think the motion was well taken.

The Court: I understand from the attempted statement of the witness that he wanted to make some explanation of his answer. In view of that fact and in view of your request, the Court will reserve ruling and give you the opportunity of further inquiring of the witness, whenever you have finished or now, which ever is more convenient to the government counsel. The Court will give the defendant the opportunity of further examination as a witness.

Mr. Evans: I would like to continue with my cross examination.

The Court: You may do that.

Q. I believe your testimony as to his character refers back to 1947 and prior to that time, is that correct? A. That is correct. [123]

Q. You know nothing about his present reputation, as I understand it?

A. I am very familiar with his present reputation now too.

Q. You say you live at Poulsbo?

A. That's right.

Q. About how far is Poulsbo from Seattle?

A. About an hour and fifteen minutes. I commute every day.

(Testimony of Chester G. MacMillan.)

Q. You are still working here in Seattle?

A. That is right. I spend quite a bit of time down in the National Bank of Commerce incidentally.

Q. How many people have you discussed Mr. Verner's reputation with during the last two years?

A. Probably fifty or seventy-five.

Q. You have made it a point to discuss his reputation with other people? A. Certainly.

Q. What has been your purpose in discussing his reputation with other people?

A. Mr. Verner is a very good friend of mine. I worked with him for years. I am very interested in everything he does.

Q. How long has that friendship lasted?

A. Since 1933 particularly. [124]

Q. You consider him a personal friend of yours since 1933? A. Absolutely.

Q. Very close personal friend?

A. Very close personal friend.

Q. As I understand it, you consider him to be a law abiding citizen, is that part of your direct testimony?

A. Well, I have to stop and think—the use of the words you put in here sometimes aren't the way I usually use them.

Q. I am not trying to put words in your mouth you didn't say. Was that the import of your testimony on direct examination that he has a good reputation for a law abiding citizen?

(Testimony of Chester G. MacMillan.)

A. I can't think of any ulterior motive in that, so I will say yes.

Q. Will you read Exhibit 3, not out loud but to yourself, and let me know when you have finished? Have you had an opportunity to read it?

A. That's right.

Q. There is mention in there of certain illicit relationships by Mr. Verner? Did you know about those relations at the time you testified as to his reputation for being a law abiding citizen?

A. I have no direct knowledge of any of these things [125] that happen here.

Q. If you had known of the contents of this letter prior to giving your testimony, would you still say he had a good reputation for being a law abiding citizen?

A. I would like to ask the lawyer for the defense how to answer that question. It seems like you are splitting a hair here. I am more than a little interested in what you are doing.

The Court: The question is one of fact and not one of law. It is a question of what was in your mind as of the time inquired about, so you should answer the question from that standpoint.

The Witness: In the first place, I am not familiar with the point of law in which the question is asked.

The Court: It is not a point of law, it is a question of fact. It is a question of what actually, under the conditions stated, would have been your attitude.

(Testimony of Chester G. MacMillan.)

The Witness: Well, the words law abiding citizen indicate you are not breaking any laws. Does this letter indicate that some law has been broken? That is a job for lawyers, I am not a lawyer.

Q. The question is, had you known about this letter and its contents prior to giving your direct testimony, would you still say that this defendant had a good reputation as a [126] law abiding citizen?

Mr. Turner: I object to that as an unfair question. The direct examination related to the time when Mr. Verner was employed at the bank, which terminated about 1946. That was expressly brought out in direct examination. The letter was not mailed until 1948, some two years later. Now counsel for the government has on cross examination carried the matter down to date, to a subsequent time. I have no particular objection if he wants to find out if this witness knows about his reputation at the present time, but it grossly unfair to the witness to put a question like that which assumes in its very wording that a letter written two years subsequent to the time of his testimony on direct is in contradiction of that testimony relating to the earlier time. It is unfair.

The Court: Read the last question in its final form propounded by interrogating counsel.

(Last question read by reporter.)

The Court: The objection is overruled.

The Witness: I am having a pretty difficult time

(Testimony of Chester G. MacMillan.)

making up my mind what is a law abiding citizen. I don't know what comes under that category, frankly. I have never been asked that question before.

Q. You have testified, I believe, that he was a law [127] abiding citizen. My purpose is to consider what you consider a law abiding citizen.

A. I am trying to find out what the law thinks is a law abiding citizen before I answer it.

Mr. Evans: I ask that the witness be instructed to answer the previous question which I put.

The Court: Will you read that letter your attention was referred to and note the contents of the letter and after you read it silently, I wish to have this question read again and then the Court will ask you to make an answer to the best of your ability.

Mr. Turner: If the Court please, I think in view of the previous rulings of the Court, the defendant should make a further objection now to that question, that is, that the question brings up the issue of the truth of the matters alleged in the letter.

Counsel for the government has previously taken the position with this Court that the truth of the matter referred to had no bearing upon this case, and yet he is now assuming the truth of the matters alleged in that letter in the cross examination of this witness. I think that definitely opens up the truth of the matters alleged. I am perfectly willing to go into that matter, and the defense is going to

(Testimony of Chester G. MacMillan.)

offer testimony about the truth of the matter if this objection is [128] overruled.

The Court: The objection is overruled. The Court pauses for a moment to see if there are any further objections, after which I wish the witness to have an opportunity of considering the matter before him with a view to making answer.

Mr. Turner: Defendant has no further objection, Your Honor.

The Court: Read the question in its final form and let the witness consider that question.

(Last question read by reporter.)

The Court: Read this exhibit and make answer to the question as best you can.

The Witness: Previous to reading the letter, in my opinion he had a good reputation as a law abiding citizen.

Q. I will ask you what is your opinion in that regard after having read the letter?

A. Well, I am back where I was a minute ago. What is the point of law on this one? I am confused and hesitant to answer it. You have got an implication in there that somebody is guilty of something. I am concerned over my answer, I am guilty before I answer it.

Q. Do I understand you are reluctant to answer my last question? [129]

A. Yes.

Mr. Evans: No further questions.

(Testimony of Chester G. MacMillan.)

Redirect Examination

By Mr. Turner:

Q. Mr. MacMillan, will you state whether or not your administrative duties included knowing what the standing of the men in responsible positions in the bank was?

A. That was. That particular phase was part of my duties and particularly in regard to Mr. Verner.

Q. Why particularly with regard to Mr. Verner?

A. As administrative assistant, he was in charge of hundreds of millions of dollars in securities, possibly one hundred million dollars in cash and corresponding bank accounts. There cannot be any question or any doubt as to the honesty or integrity of people engaged in such work.

Mr. Turner: That is all.

Recross Examination

By Mr. Evans:

Q. Mr. MacMillan, were you present working at the bank at the time Mr. Verner's employment there was terminated? A. Yes.

Q. Will you state whether or not he was not asked to [130] resign?

A. Say that again. What do you mean, asked? You have two words in there I don't put together.

Q. I will rephrase the question. Isn't it a fact that he was asked by the officials of the bank to resign because his accounts were in such bad shape, it was necessary to ask him to resign?

(Testimony of Chester G. MacMillan.)

A. That is not true.

Q. It is not true? A. It is not true.

Q. You are certain of that? A. Positive.

Q. Isn't it a fact that he was asked to resign?

A. That is true.

Q. Why was he asked to resign?

A. Doubtless because of his association with Mrs. Thornquist. His conduct became a little lax in his transactions with other department heads and branch managers, and he was probably guilty of—the word guilty is not right, let me think a minute—I would like to strike out the word guilty, I don't like that word. His only errors were in approach to problems of jurisdiction, coming into the heading of good business judgment, and as such in his capacity it was necessary for him to use good business judgment in practically all cases. [131]

Q. How long had he been employed in the bank?

A. Well my experience is from February 23, 1929. I don't know how long he worked for the National City.

Q. And suddenly his business judgment became faulty? A. Yes.

Mr. Evans: I have no further questions of this witness.

Mr. Turner: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner: Mr. Verner.

ERNEST VERNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Your name is Ernest Verner?

A. It is, sir.

Q. You are the defendant in this case?

A. I am. [132]

Q. State your age. A. Forty-three.

Q. You have been married for about 22 or 23 years? A. That's right.

Q. Up until the time you became involved with Mrs. Thornquist, there was no trouble between you and your wife? A. That's right.

Q. You were happily married?

A. That's right.

Q. You were then during that period or at least most of that period, employed by the National Bank of Commerce?

A. And its predecessor, that's right.

Q. Then you were requested to resign as testified to by Mr. MacMillan?

A. That is correct.

Q. Since that time, what has been your occupation?

A. Oh, I put in—right after that I put in approximately two and a half years with the government.

(Testimony of Ernest Verner.)

Q. In what part?

A. General accounting office.

Q. And were you working here or elsewhere?

A. I started with the Seattle office, transferred to San Francisco, or Spokane prior to San Francisco, all for the same——

Q. Seattle, Spokane and San Francisco in that order? [133] A. That's right.

Q. What is your business at the present time?

A. I am secretary-treasurer of the Radio Dispatch Company. That is where I devote most of my time to. Also we have two other corporations.

Q. In addition to that, have you done other work on the side? A. Some accounting work.

Q. Over what period of time have you done that?

A. January of 1948.

Q. Didn't you do some accounting work prior to that? A. When I was at the bank?

Q. Yes.

A. I had a couple of small accounts then, yes.

Q. That was on the side? A. That is right.

Q. I will ask you to refer to Plaintiff's Exhibit 1. Will you examine that and state whether or not that is true as it is expressed there—first I want to ask you whether that is your own language?

A. No, I did not write that.

Q. Are there any statements in there that are not correct or which convey an incorrect implication which is not in accordance with the truth?

A. There is, sir. [134]

(Testimony of Ernest Verner.)

Q. Which are they?

A. The second paragraph, and the second sentence in paragraph 3.

Q. Did you read the statement over before signing it?

A. I glanced it over, that's right sir.

Q. At that time you signed it, did you appreciate those statements were incorrect?

A. I did not.

Q. Tell the jury what happened at the time of this interview with Mr. Mein?

Mr. Evans: I am going to object to that type of question. I think counsel should stick to question and answer.

The Court: I believe that is better. Ask him specifically concerning some particular phase of—the question is too general. The objection is sustained.

Q. How long did that interview last?

A. An hour and a half, between an hour and an hour and a half.

Q. Would you state whether or not very much was said which is not included in this statement?

A. Well, no hour and a half conversation can be put on three paragraphs on one sheet of paper.

Mr. Evans: I ask the answer be stricken.

The Court: It is stricken. The jury will [135] disregard it. Just answer the question.

The Witness: Could I have the question again?

The Court: Read the question.

(Last question read by reporter.)

(Testimony of Ernest Verner.)

The Witness: Yes.

Q. Was anything said about the background, particularly with reference to your relationship with Mrs. Thornquist? A. It was.

Mr. Evans: I am going to object to this line of testimony. The witness is not disputing the statement except in two or three respects. If he disputes that, he can say so. I see no reason to go into all that they may or may not have talked about at the time.

The Court: The Court is going to sustain the objection. I respectfully suggest to counsel interrogating that he call to the witness's attention a statement or statements in this written statement and ask him if there are any pertinent questions which may properly be propounded to the witness concerning those statements in that written form which is Exhibit 1 that you invite his attention to and ask him questions about.

Q. I call your attention to the second paragraph and ask you whehter or not that is a correct expression of what you told Mr. Mein at that time?

A. This second paragraph? [136]

Q. Yes. A. No.

Q. What did you tell Mr. Mein, if you recall?

A. I had started divorce proceedings.

Q. Did you also indicate to him whether or not this was a matter of your own instigation or whether it was at Mrs. Thornquist's insistence?

A. I did tell him so.

(Testimony of Ernest Verner.)

Q. Which did you tell him? My question was in the alternative.

A. That it was her instigation.

Q. At her instigation?

A. That's right sir.

Q. What was the fact? A. It was.

Q. Actually, how did it come about that you did institute those divorce proceedings?

Mr. Evans: I am going to object to this. I don't believe it is material as to why or if he instituted divorce proceedings.

The Court: The objection is overruled.

The Witness: What is the question again, please?

Q. Read the question.

(Last question read by reporter.)

A. Upon her insistence. [137]

Q. Did you tell Mr. Mein that you had the intention of marrying Mrs. Thornquist?

A. I did at one time.

Q. What was the time of that intention?

A. 1946.

Q. Did you ever abandon that? A. I did.

Q. Did you try to return to your family, to Mrs. Verner? A. I did.

Q. How many attempts did you make to get rid of Mrs. Thornquist?

A. I doubt if anyone could count them.

Q. You will state it is a large number?

A. Several times.

(Testimony of Ernest Verner.)

Q. Did any of them work? A. No sir.

Q. At the time referred to in the third paragraph, which was shortly before December 1, 1948, is the first sentence correct, that you had learned that Mrs. Thornquist was associating with Mr. Fardon? A. I had heard it, yes.

Q. Referring to the second sentence, is that correct?

A. That was not the gist of the conversation.

Q. Do you recall what the conversation was on that [138] point? A. I do.

Q. What was it?

A. I became angry at the trouble she had caused me previously.

Q. Did you tell Mr. Mein about that?

A. I certainly did.

Q. Did you say anything to him in substance that you became angry in the sense of being jealous of Mr. Fardon or anything of that sort?

A. No sir.

Q. Did you also tell him whether or not you had mailed a copy of this letter to Mrs. Thornquist?

A. I did.

Q. Did he know that you had mailed one at that time? A. I told him I had.

Q. Before you told him, did he know it or did he indicate that he knew it?

A. He told me he had not contacted her yet.

Q. He said nothing to indicate to you whether your statement to him was enough?

(Testimony of Ernest Verner.)

A. No sir.

Q. What did Mr. Mein tell you about the character of your interview with him?

Mr. Evans: Just a moment. Who do you refer to as [139] him?

Mr. Turner: Mr. Mein.

Mr. Evans: I am sorry, I don't understand the question.

The Court: Read the last question.

(Last question read by reporter.)

Mr. Turner: I will rephrase it. What did Mr. Mein say to you at the time of this interview with him, your interview with him on or about December 1st, about the character of that interview, what he was doing?

A. I was called in. He told me he was making a routine check on the complaint.

Q. In what manner did he make that statement, with particular reference to whether it should be regarded as a serious matter?

A. That it was just a routine check up, probably nothing will come of it, but that wasn't up to him to say whether it would or wouldn't.

Q. Did he make that statement to you about its being a routine check up and nothing might come of it more than once? A. Several times.

Q. Did he also advise you that you had the right to have an attorney? [140]

A. He told me I could have an attorney, he did not advise me to.

(Testimony of Ernest Verner.)

Q. He didn't advise you to have one?

A. He didn't come right out and say advise, he said I could have one.

Q. How many times did he tell you that?

A. At least once or twice.

Q. Did he make any statement to suggest there was no need—to convey to your mind the need of the presence of an attorney at that interview?

A. No sir.

Q. Did you in fact appreciate that you needed one at that interview?

A. No sir.

Q. Will you state whether or not Mrs. Thornquist was in fact the aggressor in the formation of your relationship with her which culminated in your leaving your home?

A. She was.

Mr. Evans: I am going to object to this as being entirely irrelevant and immaterial.

The Court: The objection is overruled.

Q. Will you answer the question, please?

A. She was.

Q. Did you know it at the time it began? Did you know that she was the aggressor, did you appreciate that? [141]

A. Not at the time, no.

Q. You left home about what time?

A. December, 1945.

Q. And then subsequently a divorce proceeding was instituted in your name against Mrs. Verner, was it?

A. The early part of 1946.

(Testimony of Ernest Verner.)

Q. Can you tell who made the arrangement for the attorney? A. She did.

Q. That is Mrs. Thornquist?

A. That is correct.

Q. Did you stay with Mrs. Thornquist over a period of time? A. I lived at their house.

Q. About what period of time did that relationship continue?

A. January through April, 1946.

Q. And that relationship was in fact an illicit relationship? A. It was.

Q. Then you subsequently decided to break it off and return to your wife? A. I did.

Q. Did you do that? A. I did that. [142]

Q. After you did that, at the time you did that, did you endeavor to break off your relationship with Mrs. Thornquist? A. I did.

Q. What did she do?

A. Insisted on it being the other way.

Q. That is, on the continuance of the relationship?

A. On a continuance of my leaving my wife, yes.

Q. Did she also insist that you marry her?

A. That's right.

Q. To what extent did she go in endeavoring to carry out her will that that should come about?

Mr. Evans: I am going to object to this. I think there has been all the latitude allowed that should be allowed in going into this man's troubles in that regard if any. It hasn't anything to do with bear-

(Testimony of Ernest Verner.)

ing on whether or not he mailed the letter, whether or not it was lewd, lascivious and filthy. Those are the only issues involved here.

The Court: To what extent or length do you expect in this particular inquiry?

Mr. Turner: I want to characterize it in general, to give the jury the fact that this was a matter of terrific stress. I don't want to go into it in great detail, but I do think—— [143]

The Court: The objection is overruled for the purpose stated.

Q. Just face the jury and tell them, describe to them the character of Mrs. Thornquist's action in that regard that I referred to in my question.

Mr. Evans: I am going to object to the witness being permitted to literally make an argument to the jury. I am going to ask counsel be required to confine it to question and answer.

The Court: The objection is sustained. Proceed by question and answer.

Q. Read the question.

(Last question read by reporter.)

A. By creating scenes and embarrassment.

Q. You say creating scenes and embarrassment. What would she do? Would she come to your office, for example?

A. She has been there lots of times.

Q. What offices and where?

A. One of them, the General Accounting Office, when we had our office in the Central Building. The

(Testimony of Ernest Verner.)

General Office Accounting in Spokane, the clients I had at their homes, the clients I had here in town over in the market, and lately in my own office on Fourth Avenue.

Q. What for example did she do with respect to the client at the client's home? You were out there to do some [144] accounting work, is that right, or tax work? A. That is right.

Q. What did you find when you came out of your client's house?

A. She came in before I got out.

Q. And what had she done?

A. Used her influence on them to persuade me to leave my wife, which she has done on all occasions.

Q. What did she do in the General Accounting Office right here in the Central Building? Can you give an instance of a scene of humiliation and embarrassment she caused you?

A. Well, it was in the summer time, it was very hot and I had the door open. She would walk in and out, spent constantly the eight-hour shift I was working standing in the door.

Q. Did she ever use physical violence on you in that General Accounting Office?

A. Not in the General Accounting Office.

Q. Did she at any other place?

A. In my own office on Fourth Avenue, yes.

Q. What did she do at that time?

A. Slapped me.

(Testimony of Ernest Verner.)

Q. About what?

A. The same question. [145]

Q. About returning to her?

A. About leaving my wife.

Q. Did you ever get her to agree to leave you alone?

A. I did.

Q. How many times?

A. Several.

Q. When you left Seattle and went over to Spokane, did you let her know what your residence address was over there?

A. No.

Q. You tried to conceal it from her?

A. She never had my residence address in Spokane.

Q. Did she write to you over there?

A. At the office, yes.

Q. Did you receive letters from Mrs. Thornquist?

A. Yes sir.

Mr. Turner: I have four illustrative letters.

Mr. Evans: I am going to object to their even being marked as exhibits. Such a line of questioning going on here is entirely outside the issues of this case. The truth or falsity of the matters in this letter are not in issue. This is not a libel case, this is not a divorce case. The only issues involved here are whether or not this defendant placed the letters in question in the mail and whether or not they are [146] lewd, lascivious and filthy and whether or not somebody else wrote him some letters or not can have no bearing on that question.

The Court: The Court believes that the matter

(Testimony of Ernest Verner.)

of intent with which he operated is at issue and the Court is admitting these matters to the extent which the Court has up to this time admitted them as bearing upon the question of the defendant's mind and intent with which he operated. You may have them marked.

(Letter marked Defendant's Exhibit A-1 for identification.)

(Letter marked Defendant's Exhibit A-2 for identification.)

(Letter marked Defendant's Exhibit A-3 for identification.)

(Letter marked Defendant's Exhibit A-4 for identification.)

Mr. Turner: I would like to say for the Court's information that these letters have no connection with each other.

Q. Mr. Verner, will you look at that letter, Exhibit A-1 for identification and state if you know whose handwriting [147] that is? A. I do.

Q. In whose handwriting is the letter?

A. Mrs. Thornquist's.

Q. Did you receive it on or about the date it bears? A. I did.

Mr. Turner: I will offer it in evidence.

Mr. Evans: What is that date?

The Witness: 2-2-45.

Mr. Evans: It is objected to as not being within the issues of this case. It doesn't make any difference what Mrs. Thornquist may have written to this

(Testimony of Ernest Verner.)

defendant. The defendant is not charged with having received any letters from Mrs. Thornquist, or he is not being charged with his relationship with Mrs. Thornquist.

The sole issues in this case are whether or not he mailed these letters and whether or not they are lewd, lascivious and filthy and there are no other issues in this case. Opening up these issues serves no purpose at all. The only intent involved in this case is whether or not he intended to put these letters in the mail box and have them conveyed by mail.

Certainly, having received letters from Mrs. Thornquist can have nothing to do with his intent as required by the Statute. These letters have absolutely [148] nothing to do with the issues in this case at all.

The Court: The objection is overruled. Defendant's Exhibit A-1 is admitted.

(Defendant's Exhibit A-1 received in evidence.)

DEFENDANT'S EXHIBIT No. A-1

[Letter]

2-2-45

Dear Punkin:—

Here I sit in my little bed, with your picture in front of me, writing you a letter as I promised. I wish you were here! I'll be so glad when the day comes that I won't have to let you go every night.

Defendant's Exhibit No. 1-A—(Continued)

It is pouring rain & I can sit here & listen to the rain on the roof—it sounds good—it fact I hope it rains all day tomorrow. And incidentally I'm going to keep you in tomorrow afternoon & make you relax for once. No kidding, sweetheart, you've just got to or you'll get sick & then where would we be? I'd just actually die if anything ever happened to you—so—you've got to mind & do as I say! And—no gadding about tomorrow.

Tomorrow makes two months of the most happiness I have ever known. It's only the beginning darling—everything will work out just like we want it. It has to; otherwise life just wouldn't be worth living as far as I'm concerned. Now you quit worrying about things because it's all going to be alright.

I love you dear & there aren't many people in this world who are lucky enough to have anything as nice as you are—so I feel very fortunate. I just know we're going to have the most wonderful life anyone has ever had & it's only the waiting for it to begin that is difficult.

Goodnight, darling & I do dream of you every night.

From

Your baby.

[Endorsed]: Filed October 26, 1949.

(Testimony of Ernest Verner.)

Q. Now, Mr. Verner, would you first state whether or not at the time you received that letter you were living with Mrs. Verner at home to the knowledge of Mrs. Thornquist?

A. February, 1945? Yes.

Q. May I read the letter to the jury now, Exhibit A-1?

The Court: You may do so now or later, whichever would be preferred.

Mr. Turner: I think it would be better now because we are skipping large portions of time, Your Honor.

The letter is dated 2-2-45.

“Dear Punkin:

Here I sit in my little bed, with your picture in front of me, writing you a letter as I promised. I wish you were here! I’ll be so glad when the day comes that I won’t have to let you go every night.

It is pouring rain & I can sit here & listen to the rain on the roof—it sounds good—in fact I hope it rains all day tomorrow. And incidentally I’m going to keep you in tomorrow afternoon & make you relax for once. No kidding, sweetheart, you’ve just got to or [149] you’ll get sick & then where would we be? I’d just actually die if anything ever happened to you—so—you’ve got to mind & do as I say! And—no gadding about tomorrow.

“Tomorrow makes two months of the most happiness I have ever known. It’s only the beginning darling—everything will work out just like we want

(Testimony of Ernest Verner.)

it. It has to; otherwise life just wouldn't be worth living as far as I'm concerned. Now you quit worrying about things because it's all going to be all right.

"I love you dear & there aren't many people in this world who are lucky enough to have anything as nice as you are—so I feel very fortunate. I just know we're going to have the most wonderful life anyone has ever had & it's only the waiting for it to begin that is difficult.

"Goodnight, darling & I do dream of you every night.

From
your baby."

Q. What is Exhibit A-2—first is an envelope you received through the mail? A. It is.

Q. Attached to it are two or three other sheets. Will [150] you tell what those three other sheets are? Were they enclosed in the letter when you received it? A. They were.

Q. One of those is a blank sheet, an entirely blank sheet of paper? A. It is.

Q. That was folded up with the two small sheets enclosed in it? A. That's right.

Q. Were the small sheets stapled together and inside the folded sheet when you received it?

A. I don't know if they were stapled together.

Q. But they were there, is that right?

A. That's right.

(Testimony of Ernest Verner.)

Q. Will you state what those are, those small sheets, are they slips from a calendar pad, a desk calendar pad? A. They are.

Q. Did they have those circles drawn in pencil on them at the time you received them?

A. That's right.

Q. Do you recognize the handwriting appearing on the second of those calendar pad slips?

A. I do.

Q. Whose is it?

A. Mrs. Thornquist's. [151]

Q. Refer again to the first page of that Exhibit, which is the envelope, and look at the post mark. Did you receive that letter in the mail on or about that date? A. No.

Q. By the way, what is the date that is on there? The post mark? A. December 4, 1945.

Q. About when did you receive it?

A. I came home from California the day before Christmas. It would have to be December 24th.

Q. At the time the letter was mailed, you and Mrs. Verner were in California?

A. I had been in California since October, that is right.

Q. Mrs. Thornquist didn't know your address down there? A. That's right.

Q. You still owned your home here in Seattle?

A. That is correct?

Q. This was mailed to you at your Seattle home?

A. That is right.

(Testimony of Ernest Verner.)

Q. You got it on your return to Seattle about Christmas time in that year?

A. We returned home the day before Christmas, that's right. [152]

Q. You and Mrs. Verner came together?

A. That's right.

Q. On the first of those calendar pad slips, the date circled is what? A. November 27th.

Q. And what is that date?

A. That date is an anniversary, the first time we went out.

Q. By we, you mean you and Mrs. Thornquist?

A. That's right.

Q. What is the second date, the second circled date? A. December 3rd.

Q. What is that date?

A. That is the date she wrote to her husband overseas asking for a divorce.

Q. Was he in the service at that time?

A. He was in Belgium.

Q. So when you first knew her, she had a husband of her own, is that right? A. She did.

Mr. Turner: I will offer Exhibit A-2 in evidence.

Mr. Evans: Same objection I made heretofore.

The Court: Overruled. Defendant's Exhibit A-2 is admitted. [153]

(Defendant's Exhibit A-2 received in evidence.)

DEFENDANT'S EXHIBIT NO. A-2

[Envelope postmarked]: Seattle, Wash., Dec. 4,
2:30 P.M., 1945.

[Letterhead Seattle Rubber Stamp Co.]

Mr. Ernest Verner

1007-W. 67th.

Seattle, Washington.

[Memo pad]: Tuesday, November 27, 1945.

[Memo pad]: Monday, December 3, 1945.

Doesn't it mean anything anymore?—V. T.

(Testimony of Ernest Verner.)

The Court: At this time we will take a ten minute recess.

(Recess.)

The Court: All are present as before the recess. You may proceed.

Q. Mr. Verner, before reading this, I call your attention to the fact that these two slips from the calendar pad appear to have been taken from the 1945 calendar. I think your testimony was that the dates circled were the 27th of November and the 3rd of December. They were anniversary dates, were they? A. That's right.

Q. The 27th of November referring to the date when you were first out with her?

A. That's right.

Q. Referring to what year as to the time you were first out with her ?

A. The year on the calendar pad has no bearing on it whatever, no significance in the year at all.

(Testimony of Ernest Verner.)

Q. The first time you had been out with her was in the year 1943, is that right?

A. That's right. [154]

Q. And the day she decided to divorce her husband was in what year?

A. 1944. The other one is 1944, November 27, 1944.

Q. There is nothing whatsoever on the first calendar date, just a pencil mark around the date on the calendar. The second date, December 3rd, is also circled in pencil and in handwriting below it, it says "Doesn't it mean anything any more? V. T."

Will you refer to Exhibit A-3. You received that in the mail, did you? A. I did.

Q. In whose handwriting is that?

A. Mrs. Thornquist's.

Q. What was the date?

A. April 7, 1947.

Q. You were in Spokane, were you?

A. That's right.

Q. Will you refer to, I think it is the third page of the letter? There is a name, Addie, mentioned. Who is Addie?

A. My wife.

Mr. Turner: I offer Exhibit A-3 in evidence.

Mr. Evans: Objected to for the same reasons given heretofore.

The Court: The objection is overruled. Defendant's [155] Exhibit A-3 is admitted.

(Defendant's Exhibit A-3 received in evidence.)

(Testimony of Ernest Verner.)

DEFENDANT'S EXHIBIT NO. A-3

[Letter]

Sunday

My Dearest Darling—

There is no need to write & attempt to describe to you how I feel. You are feeling just as I do at this very minute. I can feel it. I know it is so.

This is not a letter to ask "Why." I only want you to have my thoughts to keep with you forever.

I love you more than life itself. You know this as surely as you know your own name. Nothing will ever change my feeling.

I have read between the lines in your recent letters & have known for a long while what was going to eventually happen. Although I've hoped against hope that I was wrong.

I don't know if this letter will bring you any comfort or not. I only write hoping that in some small way I can help you regain your sense of balance. I know on what a thin thread it is depending—even right now. I can understand everything—there is no need for you to have to tell me.

I shall never stop loving you—no one can ever rob me of that small happiness. And it is small I know. This one truth remains & don't you ever forget it!! The day Addie Dies I'll still be waiting for you & loving you. Keep that thought in your mind—I can't change it even if I would.

Defendant's Exhibit No. A-3—(Continued)

I hope somehow I will know as time goes by that you are well & what you are doing. If there is no way for me to know this I want you to know that I wish the best there is for you always. If you ever want to hear from me or need me in any way, I'll be right here.

I'm just remembering the good—don't give up, darling—try & find some happiness for yourself some way as I will have to do.

You have my heart & my love to keep with you forever.

/s/ VERNE.

[Envelope]

[Rubber Stamp] Via Air Mail, Special Delivery,
Via Air Mail.

[Rubber Stamp] Special Delivery. Deliver to
Addressee Only. Return receipt requested.

[Rubber Stamp] Fee Claimed at Spokane, Wash.

[Rubber Stamp] Registered No. 66747.

Ernest Verner

c/o U. S. Gen'l. Accounting Office

Room 505—Welch Bldg.

Spokane 8, Washington

[Postmarked] Seattle, April 7, 1947, Wash.

[Return Address on back of envelope]

Verne Thornquist

1115 - 32nd Ave.

(Testimony of Ernest Verner.)

The Court: You may read it now or later, whichever is more convenient.

Mr. Turner: This is an airmail, special delivery, return receipt requested letter, deliver to addressee only, addressed to Mr. Ernest Verner, c/o United States General Accounting Office, 505 Welch Building, Spokane, dated Sunday.

“My dearest darling:—

There is no need to write & attempt to describe to you how I feel. You are feeling just as I do at this very minute—I can feel it—I know it is so.

“This is not a letter to ask ‘why’. I only want you to have my thoughts to keep with you forever.

“I love you more than life itself. You know this as surely as you know your own name. Nothing will ever change my feeling.

“I have read between the lines in your recent letters & have known for a long while what was going to eventually happen—although I’ve hoped against hope that I was wrong.

“I don’t know if this letter will bring you any comfort or not. I only write hoping that in some small [156] way I can help you regain your sense of balance. I know on what a thin thread it is depending—even right now. I can understand everything—there is no need for you to have to tell me.

“I shall never stop loving you. No one can ever rob me of that small happiness. And it is small I know. This one truth remains & don’t you ever forget it!! The day Addie Dies I’ll still be waiting for

(Testimony of Ernest Verner.)

you & loving you. Keep that thought in your mind—I can't change it even if I would.

“I hope somehow I will know as time goes by that you are well & what you are doing. If there is no way for me to know this I want you to know that I wish the best there is for you always. If you ever want to hear from me or need me in any way I'll be right here.

“I'm just remembering the good. Don't give up, darling—try & find some happiness for yourself some way as I will have to do.

“You have my heart & my love to keep with you forever.

Verne.”

Q. The date of this letter, Mr. Verner, was this shortly after that suicide attempt?

A. That is right. [157]

Q. That was over in Spokane? A. Yes.

Q. Is Exhibit A-4 a letter you received from Mrs. Thornquist? A. It is.

Q. Did you receive it on or about the date it bears?

A. I imagine the next day, about the 14th of May.

Mr. Turner: I will offer that in evidence.

Mr. Evans: Same objection.

The Court: Overruled. Defendant's Exhibit A-4 is admitted.

(Defendant's Exhibit A-4 received in evidence.)

DEFENDANT'S EXHIBIT A-4

[Letter]

Tuesday, 4:45 P.M.

Dear Punkin:

Received your cute letter this morning & was very much relieved to know you arrived safely. You made good time, too. Next time it's going to be a one-way trip & no return ever!!! I'm lining up all kinds of ideas for us & they are just waiting for your arrival to sort out & decide on. There surely are a lot of things that we can do & I know we'll be a success at it, too.

I couldn't talk to Ray yesterday as I told you in my letter last night. I just called him & as she was there he couldn't talk & asked me to phone him at home tonight so I'll see then what he has to say.

I saw J. W. Maxwell in the bank today & he stopped & talked to me for a few minutes. Said Geo. Bringoff was retiring Sept. 1st & they wanted him to retire also & he said he told them to go to hell & those are his exact words. I thought I'd die laughing. Said he'd put it up to a public vote if they tried to force it & he knew he'd win, too. He wished me a lot of luck in whatever I do & said it was nice to see me looking so well. What do you know about that? Also said there were a lot of things happening down there.

Well I've got to dash home & try & sell the refrigerator & make that wallet & water the rockery. Quite a bit for one evening so I'll write no more now & drop this in the mail on my way to bus.

Defendant's Exhibit A-4—(Continued)

Tomorrow I go to the dentist again—what a life.

Write me all the news & something more, honey, cause it's awfully hard to wait for you. I sure love you, darling, & I will but I hope it isn't a long time.

Love,

/s/ VERNE.

[Letterhead Fall & Son]

[Envelope postmarked]: Seattle, Wash., May 13, 6:30 p.m., 1947.

Via Air Mail.

Ernest Verner

c/o U. S. Gen'l Accounting Office

Room 505 Welch Bldg.

Spokane 8, Washington.

(Testimony of Ernest Verner.)

Mr. Turner: The letter is postmarked May 13, 1947, addressed to Ernest Verner, c/o United States General Accounting Office in Spokane.

“Dear Punkin

Received your cute letter this morning & was very much relieved to know you arrived safely. You made good time too. Next time it's going to be a one-way trip & no return ever!!! I'm lining up all kinds of ideas for us & they are just waiting for your arrival to sort out & decide on. There surely are a lot of things that we can do & I know we'll be a success at [158] it too.

(Testimony of Ernest Verner.)

"I couldn't talk to Ray yesterday as I told you in my letter last night. I just called him & as she was there he couldn't talk & asked me to phone him at home tonight so I'll see then what he has to say.

"I saw J. W. Maxwell in the bank today & he stopped and talked to me for a few minutes. Said Geo. Bringoff was retiring Sept. 1st & they wanted him to retire also & he said he told them to go to hell & those are his exact words. I thought I'd die laughing. Said he'd put it up to a public vote if they tried to force it & he knew he'd win too. He wished me a lot of luck in whatever I do & said it was nice to see me looking so well. What do you know about that? Also said there were a lot of things happening down there.

"Well I've got to dash home & try & sell the refrigerator & make that wallet & water the rockery. Quite a bit for one evening so I'll write no more now & drop this in the mail on my way to bus. Tomorrow I go to the dentist again—what a life.

"Write me all the news & something more honey cause it's awfully hard to wait for you—I sure love you darling & I will but I hope it isn't a long time.

"Love, Verne."

Q. Mr. Verner, will you state whether Mrs. Thornquist ever come out to your home and created scenes after you [159] returned to Mrs. Verner?

A. She did.

Q. How many times? A. Several.

Q. Give the jury some idea of it. I have said

(Testimony of Ernest Verner.)

a scene. The jury doesn't know what a scene is unless you tell them.

A. She pounded on the door, trying to gain admittance and she pounded on the door so hard that her hands cracked and there was blood on the door. She kicked dents in the door that are still there.

Q. Did she say anything or cry out or anything of that sort? A. Yelling and screaming.

Mr. Evans: I object to that as being hearsay.

The Court: Do not say what she said. Otherwise you may answer the question.

Q. Give the jury some notion of it.

A. Just yelling and screaming.

Q. How about incidents in the car? Did she ever chase you or follow you or try to do any physical damage while you were driving your car?

Mr. Evans: I object to this line of testimony once more. I hate to take up the time with continuous objections, but this is all immaterial to the issues [160] in this case, as I believe Your Honor commented last night. It has no bearing upon the issues in this case and I can see no reason for going into the conduct between Mrs. Thornquist and this defendant. It is not within the issues of this case.

The Court: What the Court said last night was with respect to what was then before the Court. The objection is overruled.

A. Yes, she chased us around in the car several times.

(Testimony of Ernest Verner.)

Q. Was that simply following, or was there ever physical contact with your cars?

A. She did, she hit it head on.

Q. Where was that?

A. Between Western and First at Denny Way.

Q. Right here in Seattle?

A. That's right.

Q. Was Mrs. Verner with you at that time?

A. She was.

Q. Shortly before you mailed this letter which is charged in the indictment, did you have another one of these agreements that this was all broken off?

A. That's right.

Q. Will you tell the jury what happened at that time and when it was?

A. Whether it was Sunday, whether Sunday was the 23rd [161] or 24th of October, 1948—I don't know whether Sunday was the 23rd or 24th—we decided to call it all off and go our own separate ways.

Q. Who called who? A. She called me.

Q. Where were you?

A. At the market.

Q. And what did she say?

A. She wanted to see me.

Q. Did you go to see her? A. I did.

Q. What did she want then?

A. She wanted to be taken over to her cousin's.

Q. Where is that?

A. Merritt, Washington, about 14 miles this side of Leavenworth.

(Testimony of Ernest Verner.)

Q. Did you take her? A. I did.

Q. How long did the drive take?

A. From about eleven o'clock Sunday to about four-thirty in the afternoon.

Q. What was said between you and Mrs. Thornquist in general briefly?

A. Decided to call it all off, each go our own separate ways. [162]

Q. What was her emotional condition during that drive?

A. Crying, her famous act, hysterical all the time.

Q. During any of that time, was she pleading with you again to leave Mrs. Verner?

A. Yes.

Q. What did you say to that? A. No.

Q. At the conclusion, the agreement was that it was all to be called off and you were each to go your own separate ways?

The Court: Don't lead the witness. Ask him what the agreement was.

The Witness: That was it, sir.

Q. When did you next hear from her?

A. The next noon, Monday.

Q. What happened then?

A. She called me at the market and told me she had a different idea.

Q. Did she say what it was, or say what she had done? A. No, sir, she never did.

Q. Do you recall her exact words?

(Testimony of Ernest Verner.)

A. That she just had a different idea to the problem.

Q. At the time you mailed the letters charged in the indictment, you also mailed Mrs. Thornquist a copy of the same letter, did you? [163]

A. I did, sir.

Q. Have you heard from Mrs. Thornquist since then? A. Several times.

Q. And what did she want?

A. A statement or an affidavit whichever you want to call it, stating that the charges in the letter were untrue.

Q. Was there anything else she wanted on any of her calls? A. Yes, sir.

Q. What else did she want?

A. I think if I answer that, it would be very embarrassing to His Honor. If he still wants me to answer that question, I will answer it.

Q. Was it on the subject of whether or not she wanted you wanted to associate with her further?

A. She did.

Q. What were you trying to accomplish by the mailing of the two letters charged?

Mr. Evans: That is objected to as being irrelevant and immaterial. The question is whether or not these letters are lewd, lascivious and filthy. What he was trying to accomplish is not within the issues of this case.

The Court: Overruled.

(Testimony of Ernest Verner.)

A. On that Sunday in October when we definitely [164] decided to come to an end on it, I told her once and for all I would expose her as to just what she was and that was what I tried to accomplish. Everything else had failed, the courts had failed, everything else had failed.

Q. Has any libel suit been served on you or started against you by Mrs. Thornquist?

A. No, sir.

Cross-Examination

By Mr. Evans:

Q. You have read that exhibit, I believe?

A. I have, sir.

Q. I will ask you whether or not your signature appears thereon? A. It does, sir.

Q. I understand you now dispute the language in paragraph 2 and the second sentence in paragraph 3, is that correct?

A. That is right, sir, the interpretation of it, yes, I do.

Q. The rest of it you have no objection to?

A. I presume you are referring to the last three paragraphs?

Q. All the rest of the letter.

A. That's right. [165]

Q. The rest of it is all true?

A. Yes, sir. I wrote the letters, I mailed them.

Q. You wrote the letters and you mailed them?

A. I did, sir.

Q. You knew you shouldn't?

(Testimony of Ernest Verner.)

A. Yes, sir, I did.

Q. Do I understand you also mailed a copy of this letter to Mrs. Thornquist?

A. I did, sir.

Q. Who else did you mail letters to, carbons of this letter?

Mr. Turner: I object to that, Your Honor. That has already been ruled on.

The Court: The present objection is overruled. This is cross-examination. You should confine it to the persons now named.

Mr. Evans: They have opened up the subject that he mailed this identical letter, carbons of it, to other people. I think I have a right to determine what other people, how many other people.

The Court: I do not recall that. The objection is sustained unless you confine it to the persons named.

Mr. Evans: Your Honor, I have a right to show other identical offenses. [166]

The Court: The objection is sustained. You may inquire concerning the persons named in the statement which are there now included in the statement admitted and which is now in evidence.

Q. How many copies of this letter did you make?

Mr. Turner: Same objection and also that it is immaterial, the number of copies he made.

The Court: The objection is sustained.

(Testimony of Ernest Verner.)

Q. Are three copies of this letter all that you mailed?

Mr. Turner: Same objection, Your Honor.

The Court: That objection is sustained.

Q. Will you state whether or not your signature appears on Exhibit 3? A. It does, sir.

Q. Will you state whether or not your signature appears on Exhibit 5? A. It does, sir.

Q. When was the last time you talked to Mrs. Thornquist?

A. March 14th of this year, 1949.

Q. You haven't called her or talked to her since then?

A. I met her on the street on Fourth Avenue April 30th. She called me March 14th.

Q. As a practical matter, you have been calling her and seeing her until the last week, haven't you? [167] A. I have not, sir.

Q. You are absolutely certain of that?

A. Positive.

Q. You have had absolutely no communication with her since April 30th, is that what you want this jury to believe? A. I do.

Q. You haven't called her?

A. I have not, sir.

Q. She hasn't called you? A. No sir.

Q. And you state that to be the absolute truth?

A. The absolute truth and emphatically.

Q. Have you been to her house since that time?

A. No sir.

(Testimony of Ernest Verner.)

Q. You have been near her premises for the purpose of going on her property since then?

A. No sir.

Q. As I understand Defendant's Exhibit A-2, you received that on or about December 24th, 1945 is that correct?

A. That is right, when I returned from California, yes sir.

Q. As I understand it, you had gone to California to escape from Mrs. Thornquist, is that correct?

A. That is right.

Q. As I understand it, you were so determined to [168] escape from her that approximately a week after you received that letter, you started living with her for a period of about three months?

A. I got this letter on the 24th although it is postmarked the 4th.

Q. As I understand it, starting in January 1946 for about two or three months you were living with Mrs. Thornquist?

A. December 31, 1945, that is right sir.

Q. You were so anxious to escape from her that you moved in with her?

A. That's right, sir.

Q. Mrs. Thornquist was married?

A. Yes.

Q. You knew she was married? A. Yes.

Q. Her husband was overseas?

A. That's right.

Q. In the Armed Forces?

(Testimony of Ernest Verner.)

A. That's right.

Q. You were not in the Armed Forces, were you?

A. No sir.

Q. And as I understand it, you had sexual relations with her?

A. Yes sir.

Q. While her husband was overseas? [169]

A. That's right sir.

Q. You were married at the time?

A. That's right.

Q. What was the date that you first went out with Mrs. Thornquist?

A. November 27th.

Q. Of what year?

A. 1944.

Q. And from then on, that relationship was continued some period of time?

A. That is right.

Q. Even up through 1948 you were still endeavoring to get loose from Mrs. Thornquist, is that correct?

A. That's right, sir.

Q. Trying so hard that you drove her to Leavenworth, spent four or five hours driving up to Leavenworth with her?

A. That's right, sir.

Q. Very difficult, wasn't it?

A. It was.

Q. Did you have anything to do with persuading her to decide to divorce her husband?

A. I did not, sir.

Q. How did it come to your attention?

A. That she was divorcing her husband?

Q. Yes. [170]

A. She told me so.

(Testimony of Ernest Verner.)

Q. I believe you testified that at one time you had decided to marry Mrs. Thornquist?

A. At one time I had, yes sir.

Q. Of course she would have to be divorced from her husband before you could marry her, wouldn't she?

A. That's right.

Q. So at one time at least you would have been pleased to learn she was going to divorce her husband, isn't that correct?

A. I presume you could interpret it that way, yes, in 1946.

Q. As I understand it, Mrs. Thornquist was causing you so much trouble you were having such a difficult time to escape from her, that you took her over to Spokane, stayed with her at the Davenport Hotel, is that right?

A. That is correct, those dates, places and times are actually correct.

Q. All set out in this letter?

A. That is right.

Q. All this was done in an effort to escape from her?

A. That's right, sir.

Mr. Evans: No further questions. [171]

Redirect Examination

By Mr. Turner:

Q. Will you state whether or not you were disturbed emotionally about this conflict, the relationship between Mrs. Thornquist and yourself and that between yourself and your wife?

A. Yes.

(Testimony of Ernest Verner.)

Q. While you were in California during the year 1945, did you consult a psychiatrist?

A. I did.

Q. Did he give you advice as to whether or not you should return to Seattle? A. He did.

Mr. Evans: I am going to object to this line of testimony. It was not covered on direct examination prior to this.

The Court: That is sustained.

Mr. Turner: The only pertinence of it, Your Honor, is that counsel on cross-examination asked a sarcastic question of Mr. Verner, saying that on his return from California he was so anxious to escape from Mrs. Thornquist that he moved in with her.

The Court: The objection is sustained.

Q. After you decided to try to break up with Mrs. Thornquist, did you ever try the expedient of just ignoring [172] her? A. I have.

Q. How did that work? A. No good.

Q. What would be the result of it?

A. She would be right down at the office.

Q. Or at your home? A. That's right.

Q. Has she ever telephoned there at unreasonable hours of the night? A. That is right.

Q. Give one example of that.

A. Around two o'clock in the morning she would call.

Q. What was the occasion of that call?

Mr. Evans: I am going to object to this. The

(Testimony of Ernest Verner.)

question wasn't covered in the original direct examination.

The Court: Was it touched upon in the cross?

Mr. Evans: Not that I know of.

Mr. Turner: Yes.

The Court: How?

Mr. Turner: By implication. Counsel asked quite a series of questions, containing a great deal of sarcasm, the fact that he is so anxious to escape from her all this time that he is having something to do with her continually. This is an explanation of that. [173]

The Court: The objection is sustained.

Mr. Turner: That is all except for an offer, Your Honor.

Mr. Evans: No further questions.

Mr. Turner: I have no other matters except to make my offers.

The Court: The jury will temporarily retire.

(Jury retires.)

Mr. Turner: I ask the reporter to read my previous offer of proof.

(Offer read by reporter.)

Mr. Turner: Your Honor, I find on further conversation with Mr. Verner that he did not personally receive the call and that the call was received by Mrs. Verner.

The Court: With what result so far as your offer of proof is concerned?

(Testimony of Ernest Verner.)

Mr. Turner: I would have to offer to prove it by Mrs. Verner, that:

Mrs. Thornquist called at two o'clock in the morning and carried on in a highly emotional state, screaming into the phone and asking what Mrs. Verner had done with Mr. Verner's body, "Where is he and can I see him again?" and words to that effect. That is all the offer.

The relevancy of the offer is to demonstrate what did happen when he tried to leave her alone. In this same telephone conversation, Mrs. Thornquist wanted to know when she could see him and where he was and all about him. It was a very emotional and hysterical call at two o'clock in the morning.

The Court: That involves the question of amount. The Court has already indulged what the Court thinks is considerable latitude in offering this type of evidence. What is the purpose of it?

Mr. Turner: Well, it is only to repel the inference contained in Mr. Evans' questions, and to have a basis in the testimony to reply to the argument I expect Mr. Evans will make to the jury, that here he is continuing to go with her for a long period of time after he says he attempted to break off, and on the face of it without the full picture, it does look incongruous.

The Court: On what issue do you make the offer?

Mr. Turner: To show that it is in support of Mr. Verner's general statement that he had tried everything else and it had failed to work.

(Testimony of Ernest Verner.)

The Court: What issue in the case does that relate to? [175]

Mr. Turner: On the intent in mailing the letters, he tried everything else and it failed to work. Finally he wrote these letters hoping that by exposing her he could expose her and be rid of her.

The Court: Is there any objection to this offer to call Mrs. Verner to the stand for the purpose of making this proof which he now offers?

Mr. Evans: Yes, I certainly do object to that, Your Honor. There is certainly no excuse and no defense to this action here for the defendant to show that he was taking the law into his own hands and committing an illegal act for some private purpose of his own and that is exactly what they want to show, that he became mad and disgusted for some reason or other so he took the law into his own hands and put these letters into the mail. Certainly that is no defense.

The Court: The order in which the proof is to be made gives the Court some added concern. If the offer was as to evidence which the witness on the stand might give, the situation might be somewhat different than that of calling another witness who has already been excused from the stand, respecting an offer of testimony which is inspired by cross-examination of a witness who is presently on the stand. [176]

The Court is inclined to overrule this objection as to this particular offer of proof and allow the

(Testimony of Ernest Verner.)

witness, Mrs. Verner, to be recalled for the purpose of this inquiry, making this offer of proof.

Mr. Turner: Before the jury is recalled, I ask the reporter to read my offer of proof as to Mrs. Verner as to which objection was made and sustained yesterday.

(Offer read by reporter as follows:

“I offer to prove by the witness, Margaret Verner, that in a conversation on the telephone early in Mrs. Verner’s knowledge of Mrs. Thornquist, Mrs. Thornquist made the statement that she was going to take her husband, Mr. Verner, away from her, Mrs. Verner.

“I also offer to prove by the witness, Mrs. Verner, that subsequently and at about the time of the institution of this divorce proceeding—probably slightly before, I am not advised of the precise date but it is approximately at that time, some time in 1945, the latter part of 1945—Mrs. Thornquist in the company of her own mother, Mrs. Dexter, called at the Verner home and in the presence of the defendant and Mrs. Verner, Mrs. Thornquist made a demand upon Mrs. Verner to give up her husband so that she, Mrs. Thornquist, could marry him.”) [177]

The Court: On what theory do you make those offers referred to now?

Mr. Turner: That Mrs. Thornquist was the aggressor, and it is just part of the general picture of harassment and pursuit which finally culminated

(Testimony of Ernest Verner.)

in this action of the defendant in trying to expose her and thus be rid of her.

The Court: The aggressor aspect of the case is not one of the issues which the government has to establish by the evidence beyond a reasonable doubt.

Mr. Turner: It bears on the matter of intent, Your Honor.

The Court: Is there anything further to be said regarding these offers?

Mr. Evans: I have nothing further.

The Court: The objection previously made and now made is overruled and you may make the proof in these three offers.

Is that all the offers now that you wish to make?

Mr. Turner: Yes, Your Honor.

The Court: Is there anything else you wish to take up in the absence of the jury?

Mr. Turner: Your Honor asked yesterday about the Musgrave case and in view of that, I presume that Your Honor would want to know about subsequent treatment of [178] that case in the Circuit Court of Appeals for the Ninth Circuit.

The Court: What is the citation of the Musgrave case?

Mr. Turner: That was 160 F. 700, and the language that Your Honor referred to on 706. I looked it up in the citator and found that the Ninth Circuit had cited that case in the case of Magon vs. United States, 248, F. 201 at p. 203.

The Court: Any other citations?

(Testimony of Ernest Verner.)

Mr. Turner: At page 203 where the Musgrave case is cited, it is cited with other authorities supporting the general rule for which defendant contends; namely, that the tendency to deprave and corrupt is an essential part of the charge, whether or not the Ninth Circuit Court of Appeals intended by that to merely cite authorities bearing on the point or whether that is intended by them to say that they approve only so much of the Musgrave case as supports that view, is a matter of opinion, but definitely the language on page 706 of the Musgrave case is contrary to what the Ninth Circuit has said. That is the point I wanted to call to Your Honor's attention.

The Court: Is there anything else?

Mr. Evans: I presume I will have an opportunity to [179] answer counsel and correct a misquotation of that case.

The Court: Yes, and if I forget to extend that opportunity, will counsel remind me of it?

Mr. Evans: I certainly will, Your Honor.

The Court: Is there anything else respecting offers of proof or proceedings in respect to this trial which should be taken up in the absence of the jury?

Mr. Turner: No, Your Honor.

The Court: Bring in the jury.

(Jury returns.)

The Court: All jurors have returned to their

(Testimony of Ernest Verner.)

places as before the temporary excusing of the jury.
All are present.

Do you wish to ask of the witness, Verner, any further questions?

Mr. Turner: No further questions, Your Honor.

Mr. Evans: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Turner: I will call Mrs. Verner. [180]

MARGARET VERNER

recalled as a witness by and on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Turner:

Q. Mrs. Verner, did Mrs. Thornquist at any time, and you will fix the time, tell you on the telephone or make any statement with reference to whether or not—or to what her intentions were with respect to your husband?

A. Yes, she did, many times.

Q. The first one when she said that, when was it and what did she say?

A. Well, it was about a year before they had ever been out together. She said “Your husband is so good to you and I am afraid—or I hope my husband will be that way to me when he comes back

(Testimony of Margaret Verner.)

from overseas." Then she kind of laughed and says, "I think I'll take your husband away from you."

Q. Shortly before the divorce started, did you receive a personal call at your home from Mrs. Thornquist and her mother? A. Several.

Q. At any time did she make a demand upon you to give up your husband so that she could marry him? A. Yes. May I say what she said?

Q. Yes.

A. She said that if I didn't give him up that she would plaster our names over every newspaper in the country.

Q. When was this statement?

A. Many times, to myself and to others.

Q. I am talking about a particular one.

A. This was in December, just before we went to San Mateo in 1945.

Q. And then you and Mr. Verner went down there together to San Mateo? A. Yes.

Q. Did you receive a call from Mrs. Thornquist at about two o'clock in the morning on one occasion?

A. Yes, several occasions.

Q. About when was that?

A. Well, she called several times the night before and during preceding our departure for San Mateo.

Q. This time I am referring to is the one you told me about, which you described, a very emotional carrying on over the telephone. Do you recognize the one I refer to?

(Testimony of Margaret Verner.)

A. I think you refer to the time that she called up and said that my husband was supposed to have taken her out [182] and instead of that we had gone to an Eastern Star dance, so she said that she had told him to come on or he was going to commit suicide. He was to cut his wrists with a razor blade and she wanted to know what I had done with his body.

Then when daylight came, she called at six and I told her he was asleep. She says, "What have you done with his body"? I said he was in bed so she came out at seven bringing some man with her and demanded to see his body. He was asleep and he heard the pounding on the door and he came dashing to the front door to see what was going on. He had his bathrobe on. I said she demanded to see his body, which of course made it rather silly, but then that was just the beginning. She was out there four times that day.

Mr. Turner: You may cross-examine.

Mr. Evans: I have no questions.

The Court: You may step down.

(Witness excused.)

The Court: Call defendant's next witness.

Mr. Turner: Defendant rests.

The Court: Is there any rebuttal?

Mr. Evans: Recall Mr. Mein. [183]

BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Mr. Mein, I believe you have been in the court room and heard Mr. Verner's testimony in regard to what he says you told him as to the seriousness or lack of seriousness of the investigation you were making? A. I did.

Q. Was what he has stated a true account of what took place at the time of that interview?

A. No.

Q. What, if anything, did you tell him in regard to the nature of the investigation you were making?

A. When he came in the office, I advised him it was a violation of the law and warned him he didn't have to make any statements or admissions of any kind and that anything he said could be used against him in Court.

Q. What, if anything, did you state in regard to the seriousness or lack of seriousness of the offense?

A. I told him it was a violation of the law and I did [184] not say it was routine.

Q. As I understand it, you made no statement to the effect that it was a routine investigation?

A. I did not.

Mr. Evans: No further questions.

Mr. Turner: No questions.

(Testimony of Bernard Mein.)

The Court: You may step down.

(Witness excused.)

Mr. Evans: The government has no further testimony.

The Court: I understand the plaintiff rests?

Mr. Evans: The plaintiff rests.

The Court: Is there anything further on the part of the defendant?

Mr. Turner: Nothing further, Your Honor.

The Court: Defendant rests.

The court will during the noon hour need some time to discuss requested instructions with counsel. The jury is excused until two o'clock and may now retire.

(Jury retires.)

Mr. Turner: If the Court please, I would like to present a challenge to the sufficiency of the evidence.

The Court: You may do so.

Mr. Turner: Defendant challenges sufficiency of the evidence and moves for a directed verdict of acquittal. [185]

The Court: The challenge is overruled and the motion is denied.

Court will be recessed until two o'clock. I ask counsel to attend with the trial judge in chambers for the purpose of considering the requested instructions.

(At 12:03 o'clock, p.m. Wednesday, July 13, 1949, proceedings recessed until 2:00 o'clock p.m. Wednesday, July 13, 1949.)

Seattle, Washington

July 13, 1949, 2:40 o'clock p.m.

The Court: May the record show call of the jury is waived and that all jurors are present and also all parties on trial with their counsel.

Mr. Evans: The record may so show.

Mr. Turner: Yes, Your Honor.

(Arguments made on behalf of plaintiff and defendant.)

The Court: Members of the jury, you have heard the testimony and the arguments of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

In this case, there is one defendant, Ernest Verner, on trial before you on the two counts of the indictment. To the indictment and to each of the counts thereof, the defendant on trial has entered a plea of not guilty. This plea puts in issue every material allegation of the indictment and each count thereof on which the defendant is being tried and casts on the government the burden of proving the guilt of the defendant on trial by the evidence beyond a reasonable doubt. The defendant is not called upon to disprove the charges of the indictment nor to prove his innocence.

The indictment is merely the paper charge and formal accusation against the defendant, which he has had no opportunity to answer until this trial. The indictment is not to be considered by you as evidence in any sense against the defendant, and the fact that the indictment has been returned by the

Grand Jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states.

The burden is always on the government to prove the defendant guilty by competent evidence beyond a [187] reasonable doubt, and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each of the two counts of the indictment on which the defendant is being tried. As to those counts, you must decide the guilt or innocence of the defendant as to each count separately, and if you have a reasonable doubt as to any material allegation of the particular count or counts of the indictment, it is your duty to acquit the defendant as to such count or counts, but if under the evidence you have no such reasonable doubt concerning any such allegation, it is your duty to convict the defendant on each count as to which under the evidence you have no such reasonable doubt.

The defendant on trial as well as every defendant in a criminal case is presumed innocent of the charges contained in the indictment until he is proved guilty by the evidence beyond a reasonable doubt, and this presumption is one of his important rights, not to be ignored or lightly considered either by the Court or by the jury. It is one of the important rights which the law accords all persons accused of crime. It attaches to them and continues with them throughout all stages of the trial and

throughout all stages of [188] your deliberations until it has been overcome by the competent evidence in the case and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons. This applies to the defendant on trial here.

By the expression "reasonable doubt" is meant in law just what those words in their ordinary and every day use imply. They have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason, or is a doubt that is not unreasonable and not merely imaginary or capricious. It is such a doubt as if entertained by a person of ordinary prudence, sensibility and decision, he would allow to influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon.

It must be a real and substantial doubt and it must rise out of the honest minded, common sense, consideration and application of the evidence in the case or from lack of evidence in the case. If from a fair and candid consideration of all the evidence, you can say upon your oath as jurors that you have an [189] abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict.

If you have no such moral convictions or if you entertain doubts for which sane and satisfactory

reasons can be assigned in your own minds, you must give the defendant the benefit of that doubt and find him not guilty.

If the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, then you should apply the presumption of the defendant's innocence and find him not guilty. Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence, I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find him guilty you must believe beyond a reasonable doubt that the evidence is inconsistent with his innocence and [190] inconsistent with every other reasonable hypothesis except that of guilt.

The law does not require the government to prove a defendant guilty beyond all possible doubt, as such proof in many cases would be impossible, but the government must prove the defendant guilty beyond a reasonable doubt as defined in these instructions.

A reasonable doubt may be created by lack of evidence or it may be created by the evidence itself. You are instructed that while a defendant at the

beginning of and during the trial is presumed to be innocent, yet if and when during your deliberations the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Count I of the indictment charges: "That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 - 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter" in violation of the law referred to in that count.

The defendant has entered a plea of not guilty to that Count I of the indictment. This places [191] the burden upon the government to prove each and every material allegation in that count beyond a reasonable doubt.

The material allegations which the government must so prove in respect to Count I of the indictment are:

1. That the offense referred to occurred on or about November 8, 1948, in Seattle, Washington;
2. That the defendant knowingly deposited for mailing an envelope addressed to Milton Fardon;
3. That the said envelope contained a letter which was lewd, lascivious and filthy.

If by the evidence you are convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a

verdict of guilty in respect to Count I. If you are not so convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty on that count.

Count II of the indictment charges: "That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and [192] filthy letter" in violation of the law referred to in that count, which is the same law referred to in the first count.

The defendant has entered a plea of not guilty to that Count II of the indictment. This places the burden upon the government to prove each and every material allegation in Count II beyond a reasonable doubt. The material allegations of that count which the government must so prove are:

1. That the offense referred to occurred on or about November 8, 1948, in Seattle, Washington;
2. That the defendant knowingly deposited, for mailing, an envelope addressed to Miss Evelyn Nelson;
3. That the said envelope contained a letter which was lewd, lascivious and filthy.

If by the evidence you are convinced beyond a reasonable doubt of the truth of each one of these three allegations in Count II, then it is your duty

to return a verdict of guilty on that count. If you are not so convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty on that count.

You are instructed that the statute referred to in the indictment provides insofar as is here material [193] that: "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character is declared to be nonmailable matter and shall not be conveyed in the mails, and that whoever knowingly deposits for mailing or delivery, anything declared by this section of the statute to be nonmailable" shall be punished as provided in the statute.

The words "lewd" and "lascivious" as used in the statute signify that form of immorality which has relation to sexual impurity. By the word "filthy" is meant that which is nasty, dirty, vulgar, indecent, offensive to the moral sense and morally depraving and debasing.

The inquiry under the statute is whether the letter charged to have been lewd, lascivious and filthy was in fact of that character and is calculated to corrupt and debauch the mind and morals of those into whose hands it might fall, and if it was of that character and so calculated and was deposited in the mails by one who knew its contents, the offense is complete although the defendant himself did not regard the letter as one that the statute forbade to be carried in the mails.

A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these [194] would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in Count I was lewd, lascivious and filthy as those terms are defined in these instructions, you will acquit the defendant on Count I.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in Count II was lewd, lascivious and filthy as these terms are defined in these instructions, you will acquit the defendant on Count II.

With reference to the contents of the letter, you are instructed that you should not judge it solely by one or more isolated words or phrases which considered by themselves might happen to be lewd, lascivious and filthy as defined to you in these instructions. You should on the contrary consider the dominant or controlling effect or character of the whole letter and judge its effect in connection with all of the issues disclosed by the evidence.

Intent is an ingredient of the crime. It is psychologically impossible for you to enter into the [195] mind of the defendant and determine the intent with which he operated. You must therefore determine the motive and purpose and intent from the testimony which has been presented, and you will

consider all of the circumstances disclosed by the testimony of the witnesses, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts.

Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent.

You are the sole and exclusive judges of the evidence and of credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the stories such witness relates, and the interest, if any, you may believe a witness feels in the result of a trial and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of [196] weight as in your judgment it is entitled to.

You will be slow to believe that any witness has willfully testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except insofar as the same may be corroborated by other credible evidence in the case.

The defendant having testified as a witness, the

foregoing relating to credibility of witnesses and weight of testimony applies to defendant and his testimony as well as to all the other witnesses in the case.

Evidence has been introduced tending to show defendant's good character in several respects. Good character reputation in the community where defendant resides is proper evidence, and its purpose and function is to strengthen the presumption of innocence of the defendant. You are instructed that evidence of good character of the defendant is to be considered by you regardless of whether the government's evidence against him be clear or doubtful, and such good character evidence, when taken alone or with the other evidence in the case, is to be considered by you in determining whether a reasonable doubt exists as to the defendant's [197] guilt.

Proof of good character is not of itself a defense if the jury is satisfied beyond a reasonable doubt that the defendant is nevertheless guilty, but proof of good character when considered by itself or with other evidence in the case may engender a reasonable doubt as to the defendant's guilt. Whether it does so in this case and what weight should be given such evidence are for you to determine from all the facts and circumstances of the case including the nature of the charge.

If after considering such good character evidence and the other evidence in the case, you entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him, but if after such considera-

tion you are convinced by the evidence beyond a reasonable doubt of his guilt, you should find him guilty.

There are two counts in the indictment. Each count charges a separate and distinct crime. You are instructed that you should consider the guilt or innocence of the defendant as to each count separately. If you believe beyond a reasonable doubt that the defendant is guilty on Count I of the indictment, but is not guilty on Count II, then you should return a verdict of guilty as to Count I and not guilty as to [198] Count II. If you believe beyond a reasonable doubt that the defendant is guilty on Count II of the indictment but not guilty on Count I, then you should acquit the defendant as to Count I and find him guilty as to Count II. Likewise if you are convinced beyond a reasonable doubt that the defendant is guilty on both counts of the indictment, you should return a verdict of guilty as to both counts. If you are not convinced beyond a reasonable doubt that the defendant is guilty on either count of the indictment, then it is your duty to return a verdict of not guilty as to both counts.

In other words, you are not required to find the defendant guilty on both counts or not guilty on both counts, but you are required to render a verdict which truly reflects your findings as to the guilt or innocence of the defendant as to each of the two counts of the indictment.

You are instructed that the government does not desire to have you bring in a verdict finding the de-

defendant guilty unless the verdict is supported by the evidence beyond a reasonable doubt, but that neither does the government want a guilty defendant to escape.

It is the duty of the Court to instruct you as to the law governing you, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

You will consider all the evidence admitted by the Court and now before you and you will disregard all evidence and exhibits offered but not admitted by the Court and all evidence stricken out by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and taking of exceptions by counsel to influence you or confuse you in your deliberation, and in reaching a verdict you should act only upon the evidence which has been admitted and is now before you and the law as it has been given to you by the Court.

Statements if any by counsel or the Court unsupported by your own recollection of the evidence, you will disregard. Likewise you will disregard all statements made by counsel and the Court to each other during the trial.

While it would be proper for me as the trial judge to analyze the testimony and to give you my

understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you [200] any opinion I may have of any fact or the weight of any evidence and if I have referred to or if I do refer to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some principle of law which is involved with the facts.

It is your duty as jurors to confer with each other freely and frankly about and to discuss together honestly the questions involved in this case for the purpose of agreeing, if you can honestly do so, upon a common verdict. In the end, however, the jury's verdict must be the verdict of each one and all twelve of you. A verdict representing the opinions of any lesser number is not a lawful verdict. The law does not contemplate that any one of you will surrender his or her own individual opinion about the guilt or innocence of the defendant so long as such one of you personally has a reasonable doubt about the matter. Regardless of what the opinions of your fellow jurors may be, as long as you have a reasonable doubt about the guilt of the defendant, if you have such reasonable doubt, it is your duty to vote for an acquittal.

If by the evidence beyond a reasonable doubt you are convinced of the guilt of the defendant as to one or more of the counts of the indictment, it will then be [201] your duty to convict the defendant on

such count or counts, if any, as to which you are so convinced.

In arriving at your verdict, you should not allow sympathy or prejudice to influence your judgment. If the defendant is guilty, no amount of sympathy will make him innocent. Likewise if the defendant is innocent, no amount of prejudice will make him guilty.

You are not concerned with what the punishment might be in the event you should return a verdict of guilty. The degree of punishment is a matter which the Court alone must decide. In other words, it is the duty of you as jurors to determine the facts of this case and it is the Court's duty unassisted by the jury to determine the amount or kind of punishment in the event a verdict of guilty is returned.

In this Court the instructions in written form are not sent to the jury room, also written transcripts of the testimony orally stated from the witness stand will not be sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

The indictment in this case will be sent to the jury room with you merely to show the paper charge against the defendant but is not to be considered as evidence. You will take with you to the jury room the exhibits in the case and this form of verdict which the [202] clerk has drawn up for your convenience. The verdict is in the usual form. As to each count on which the defendant is being tried,

before the word "guilty" is a blank space and you will write in that blank space in each instance the word "is" or the word "not" according as you find. It will require your entire number to agree on your verdict and when you have so agreed, you will cause your verdict to be signed by your foreman, whom you will elect from your number immediately upon retiring to the jury room, and return with your verdict into open court.

Counsel, have I overlooked anything? If there are any exceptions to be noted, I shall upon being so advised temporarily excuse the jury for that purpose as provided by the rule. Are there any exceptions to be noted?

Mr. Evans: I have no exceptions. I have a suggestion, however, Your Honor.

Mr. Turner: The defense has some exceptions, Your Honor.

The Court: The Court is not yet ready to submit the case to the jury for its decision, and you will, during the next temporary absence from the jury box, withhold your decision and continue to withhold discussion of this case. Later on, after having been [203] again called back to the jury box, this case will be submitted for your decision, but it is not being done now, so withhold your decision until the Court later advises you. You will now temporarily retire to the jury room.

(Jury retires.)

Mr. Evans: The second paragraph of the defendant's requested Instruction No. 2, which I believe

the Court read—initially the Court was not going to give that second paragraph, but I understand the Court later decided to give it. The very last word in that second paragraph, the word “addressee” is strictly against the previous rulings of the Court in this case.

I believe that the words “of any person into whose hands a letter might fall” are the proper words to be used. It has already been read to the jury with the term “addressee” used.

The Court: “Calculated” is for the determination of the jury. It is not for the determination of the addressee or the defendant.

Mr. Evans: I believe the proper words in the place of “addressee” is “morals of any person into whose hands that would fall.” That, I believe, conforms to the previous instruction on the definition of the terms lewd, lascivious and filthy, but to put this in there makes a conflict in the instructions.

The Court: Where is the conflict?

Mr. Evans: In the Court’s instruction—I don’t know the number the Court gave to it—but the instruction defining the term lewd and lascivious, I believe the Court ended that with “calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.” Then the Court follows with this instruction which is entirely different.

The Court: I believe that addressee is included in the phrase “into whose hands it might fall.”

Mr. Evans: Yes, it includes addressee but the

Court in this defendant's requested Instruction No. 2 has turned around and limited what has formerly been stated as any person into whose hands it might fall.

The Court: I believe that correction should be made.

Mr. Evans: I offer that as a suggestion, Your Honor.

The Court: I will consider that further.

Mr. Turner: If the Court please, the defendant excepts to that portion of the instruction on the presumption of innocence which says in substance that the presumption disappears when during the deliberations of the jury—I am not sure I heard the Court correctly.

The Court: You are instructed that while the defendant at the beginning of and during the trial is presumed to be innocent, yet if and when during your deliberation the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Mr. Turner: Defendant excepts to that instruction on the ground that it is confusing—while without more study than I have been able to give it, it might be technically correct, I am afraid that it might lead the jury to believe that after they get into their deliberation that presumption disappears. It does not say so in those words but I am afraid it is confusing and I except to it on the ground that it is confusing.

The Court: Allowed.

Mr. Turner: The defendant excepts to the refusal to give defendant's Instruction No. 3 related to a letter addressed to a definite person, that there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter. I have not quoted it precisely but it has been submitted in writing. Your Honor recognizes the instruction, defendant's requested Instruction No. 3.

I had better read it:

"You are instructed that if a letter is addressed to a definite person and deposited in the United States [206] mail for delivery to that person, there is no presumption that the letter would fall into the hands of any person other than the addressee of the letter."

The Court: I wish you would show me the case and the language of the case that rules in support of that request.

Mr. Turner: If the Court please, the case is *United States vs. Wroblenski*, 118 F. 495, at page 496, and the language is quoted in my brief, on page 6, submitted to the Court at the beginning of the trial.

The particular language I rely on is this:

"In the case of a private letter (sealed) there is no publication . ."—citing the case—"and no presumption arises of intention to give publicity, or that it will be read by other than the addressee."

The Court: What is the purpose of that statement?

Mr. Turner: Well, I think it follows from that, that we get right down to the fact that where there is a sealed letter addressed to a given party and no evidence that there was anything done by the defendant or at his instigation or suggestion to circulate it elsewhere and there is no evidence that it was circulated elsewhere, when the jury's attention is confined to determining whether or not the letter was calculated [207] to corrupt and deprave and debauch the morals of the addressee.

The Court: Mr. Evans, have you any authority to the contrary?

Mr. Evans: If the Court is going to give that instruction, then the government should be entitled to introduce its testimony that three other carbons of this letter were sent to other persons, which will show this was published just like a newspaper, scattered and broadcast. If that instruction is given, then the government certainly should have had the opportunity to have presented that information.

The Court: You have evidence in now, Mr. Evans, of both Miss Nelson and Mr. Fardon receiving the same letters.

Mr. Evans: The government was precluded from putting in the evidence that there were three more carbon copies sent to other people. I might explain why the indictment was not drawn on those others, those people destroyed them before we could have brought them in to testify they received the letters. There is no need of presenting five counts in the indictment when two is enough.

The Court: The Court had a different theory than that for sustaining the objection to the language which [208] was deleted from the statement which is in evidence as Plaintiff's Exhibit 1.

The Court was trying to avoid all possible collateral issues in the case, it being the thought of the Court that they would have introduced the possibility of further collateral testimony. In other words, if the plaintiff's evidence was going to mention separate mailing, then the defendant would have been properly allowed to introduce rebuttal testimony.

Mr. Evans: May I address the Court further?

The Court: I am considering the propriety—I have not decided upon the propriety or lack of it. I am considering the propriety of giving that instruction, No. 3 which is now the subject of discussion, and also to strike the giving of that instruction which Mr. Evans spoke of and to give it in different form, strike the word “addressee” in line 17 on that page on which defendant's requested Instruction No. 2 is written and insert in lieu thereof “Those into whose hands it might fall,” it referring to a letter.

If I make the correction suggested by Mr. Evans, I would be more inclined to give that requested instruction No. 3. I will say this on further deliberation, Mr. Evans, I do not think there is any actual conflict between the word, addressee, in line 17 and the phrase, those into whose hands it might fall. The only difference between those two expressions

is that using the phrase, the addressee, confines it to the person to whom it is mailed, that person being among those into whose hands it might fall.

I am inclined to grant the request of Mr. Evans to make that amendment, and it will have to be done by striking the paragraph of the instruction given and substituting the paragraph amended, but if I do that, I will be very likely to then add the defendant's requested Instruction No. 3 and also to decline the request of Mr. Evans to reopen the case for further testimony concerning collateral matters if No. 3 is given. I am leaving the question there involved in your request as to No. 3, Mr. Turner, for further thought. Are there any other exceptions which you wish to note?

Mr. Turner: Defendant excepts to the refusal of the Court to give the first paragraph of the defendant's requested Instruction No. 4, as I understood it Your Honor refused the first paragraph and gave the second.

The Court: That is correct.

Mr. Turner: The first paragraph reads as follows:

"You are instructed that the purpose, object and effect of a letter is to be judged by you from its contents as a whole and from the circumstances of its mailing, including the identity of the addressee, if any, his background, age, experience, position and interest, if any, in the subject matter of the letter."

That request is based on the philosophy and rea-

soning set forth in the case of—it is the Dennett case in 39 F. (2).

The Court: I wish the record to show the reason I omitted the first paragraph of Instruction No. 4 is because I think it is covered in the last sentence of the second paragraph which the Court did give.

Mr. Turner: I think it is in part covered, but it is not all covered because the second paragraph of that requested instruction confines attention to the document, and the first paragraph calls attention to the other elements which I think are proper considerations.

The Court: After the word, circumstance, at the end of the next to the last line, you wrote in your requested form, I have stricken the words following that; namely, “as above mentioned” and inserted in lieu thereof “disclosed by the evidence.” It makes it much broader than those words stated in your first paragraph.

Mr. Turner: Thank you, Your Honor. I had not [211] appreciated that.

The Court: So I am not confined to the whole letter in connection with all of the circumstances enumerated in the first paragraph of your requested form, but it is all of the circumstances disclosed by the evidence in the case. Your exception to that is allowed if you have finished your statement. If you have not, you may continue.

Mr. Turner: Nothing further on that. I had not appreciated that point, Your Honor.

The Court: Your exception is allowed. I explained to you what was done.

Mr. Turner: The case referred to is United States vs. Dennett, 30 F. (2) 564.

The defendant excepts to the refusal of the Court to give requested instruction No. 5 which reads as follows:

“If the purpose, object or effect of a letter is to give information to the addressee in which the addressee would have a legitimate interest, rather than to corrupt or deprave the morals of the addressee, then you are instructed that the purpose, object or effect is not unlawful and its mailing would not constitute a violation of the Statute.”

The Court: That involved a question of whether the Musgrave case is still the law, does it not?

Mr. Turner: If Your Honor please, I am embarrassed at answering that question because there are portions of the Musgrave case which are still the law as quoted in——

The Court: By my question, I meant the decision in the Musgrave case on that point.

Mr. Turner: I don't feel that the Musgrave case is inconsistent with that, even if it were still the law. It is something that is hard to distinguish. It is my theory that on the objective test, the document considered in the light of circumstances as disclosing a purpose, object or an effect is material and that the instruction is proper.

The Court: Exception allowed.

I advise counsel that upon recalling the jury and the jury taking their position in the jury box, I expect to make the correction requested by Mr.

Evans and I also expect to give defendant's requested instruction No. 3.

Mr. Evans: May I be heard as to No. 3?

The Court: Yes, you may.

Mr. Evans: I can see no authority in the case which counsel has cited as to any presumption one way or another, the very fact that this letter has fallen [213] into the hands of numerous people, at least 23 people in the grand jury, at least into the hands of the postal authorities, at least into the hands of this jury, certainly rebuts any presumption. I would like that to be explained to the jury, whether that is a presumption of law or a presumption of fact, and I don't think it is at all proper because these letters have fallen into the hands of many people. I can't see that there is any presumption that a letter addressed to a certain person will only be seen by that person, nor can I find any authority in the quotation cited here nor from the facts of this case that these letters or any other letters are presumed to be seen only by the person who receives them.

The Court: I am intending to strike the reading of that paragraph which the Court read as follows:

"A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these would not be lewd, lascivious or filthy within the meaning of the statute unless it was also calculated to corrupt and debauch the mind and morals of those into whose hands the letter might fall."

The words "those into whose hands the letter might fall" are not in the instruction as given but these two words were, "the addressee." I am going to strike the paragraph with the words "the addressee" and am going to give the paragraph in the form I stated a moment ago; namely, "morals of those into whose hands the letter might fall."

That is the way I am going to read it and then I am going to read Instruction No. 3. If counsel wish to take an exception, I wish them to understand that should they at this moment care to note the exception to the Court's doing these things or not doing something else, you may note it now with the same effect, let the record show, as if it be done after the Court does this in the presence of the jury and thereafter excused the jury for counsel to make further exception. Will that be satisfactory with counsel?

Mr. Turner: Yes.

Mr. Evans: Yes, Your Honor.

The Court: If it is done now it will have the same effect as if it be done after the Court makes these additions and corrections among the instructions to the jury and thereafter excuses the jury for the purpose of counsel noting exceptions. Does either side wish to note any exception to what the Court advises counsel will be done when the jury is brought back?

Mr. Evans: I don't believe I have any, Your Honor. [215]

Mr. Turner: The defendant has no exception.

The Court: Bring in the jury.

(Jury returns.)

The Court: Let the record show all jurors have returned to their places as before.

I wish the jury to be instructed that the Court wishes to and does now make one correction and one addition now. As to the correction, I am going to read the instruction which I gave which I wish to strike and then after I have stricken the instruction, I am going to read a correction of that same matter and the jury will regard it only in the final corrected form.

First, as relating to the correction, the Court does strike and the jury will disregard the following among the instructions already given:

A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Strike those words and do not pay any further attention to them in that form. Lay them out of your minds the same as if the Court had not stated them. [216]

In lieu of those words, the instruction touching that subject is to be regarded by the jury as follows, and this instruction on that subject will be the law governing the jury's action.

A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all

of these would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of those into whose hands the letter might fall.

All other instructions given by the Court will stand uncorrected but you will receive among all the others given the following added instruction.

You are instructed that if a letter is addressed to a definite person and deposited in the United States mail for delivery to that person, there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter.

If there are any further exceptions to be noted, the Court will, upon being so advised, temporarily excuse the jury for that purpose. Are there any further exceptions?

Mr. Turner: Defendant has none, Your Honor.

Mr. Evans: No Your Honor.

The Court: The clerk will now swear the bailiff.

The jury will now retire to consider your verdict, being hereafter in the conduct of the bailiff. You will hereafter remain together at all times until discharged by the Court from further consideration of this case. The case is now finally submitted to the jury for its decision and verdict.

The jury will now retire.

(Jury retires.)

(At 4:30 o'clock p. m., Wednesday, July 13, 1949, trial proceedings closed.)

CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed September 23, 1949. [218]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, I am transmitting herewith as the record on appeal in the above entitled cause, pursuant to designation of counsel, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said

pleadings, together with the exhibits admitted in evidence at the trial of said cause numbered Plaintiff's exhibits 1-5 inclusive and Defendant's exhibits A1-A-4 inclusive, constitute the record on appeal from the Judgment filed and entered July 22, 1949, to the United States Court of Appeals at San Francisco, California, to-wit:

1. Indictment.
2. Court Reporter's transcript of Arraignment and Plea.
3. Motion by Defendant to Dismiss Indictment.
4. Motion of Defendant for Bill of Particulars.
5. Bill of Particulars.
6. Praecipe for Subpoena (Milton H. Fardon et al).
7. Praecipe for Subpoena for Witnesses (William Horton et al).
8. Marshal's return on Subpoenae (Fardon & Nelson).
9. Government's Requested Instructions.
10. Defendant's Requested Instructions.
11. Defendant's Memorandum of Authorities for use of the Trial Court.
12. Verdict.
13. Marshal's Returns on Subpoenae (McMillan, Horton & Gardner).
14. Motion for Judgment of Acquittal (Renewed) and Alternative Motion for New Trial.
15. Judgment, Sentence and Commitment.
16. Appeal Bond.
17. Three letters in reference to Defendant.

18. Notice of Appeal.
19. Stipulation to Extend Time for Filing Record on Appeal.
20. Motion to Extend Time for Filing Record on Appeal.
21. Affidavit of Theodore S. Turner in Support of Motion to Extend Time for Filing Record on Appeal.
22. Order Extending Time for Filing Record on Appeal.
23. Petition to Reduce Sentence.
24. Affidavit of Margaret Verner.
25. Court's Decision of Defendant's Petition for Reduction of Sentence.
26. Reporter's Transcript of Proceedings at Trial.
27. Designation of Record on Appeal.
28. Order Directing Transmission of Original Exhibits.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 20 day of October, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12388. United States Court of Appeals for the Ninth Circuit. Ernest Verner, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12388

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

STATEMENT OF POINTS ON WHICH
APPELLANT WILL RELY

The appellant will rely on the following points in this proceeding:

I.

That the indictment, considered amended by Exhibits 2, 3, 4 and 5, does not state facts sufficient to constitute a violation of Section 1461, Title 18, U.S.C., on either ground of said indictment, and

the District Court was in error in overruling the following motions timely made by the appellant:

1. Defendant's motion for dismissal of the indictment.
2. Defendant's motion for directed verdict.
3. Defendant's motion for judgment of acquittal (renewed) and alternative motion for a new trial.

II.

The refusal of the Trial Court to admit the testimony of Milton Farden and Evelyn Nelson, as set forth in the offers of proof contained in the printed record, constituted an error and a denial of a fair trial to appellant.

/s/ ALLAN POMEROY and
/s/ ERNEST R. CLUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED

The defendant, Appellant, designates the following portions of the record to be printed:

1. Indictment.
2. Bill of Particulars.
3. Defendant's Motion to dismiss indictment.
4. Exhibits 2, 3, 4 and 5.

5. Judgment, sentence and committment.
6. Motion for judgment of acquittal renewed and alternative motion for new trial.
7. The following portions of transcript of testimony:

From line 6, page 60, to and including line 1, page 61.

From line 12, page 58, to and including line 21, page 58.

From line 16, page 61, to and including line 9, page 65.

/s/ ALLAN POMEROY and

/s/ ERNEST R. CLUCK,

Attorneys for Defendant,
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the United States of America, Appellee, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Vaughn E. Evans, Assistant United States Attorney, and designates that the entire transcript of the record, testimony and exhibits be printed as the record in the above entitled cause.

Dated at Seattle, Washington, this 31st day of October, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1949.

